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Supreme Court, U.S.
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In The Supreme Court of the United States

ICE EMBASSY, INC., *et al.*,

Petitioners,

vs.

CITY OF HOUSTON, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI, VOLUME III, Pages 300 to 510

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IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

N.W. ENTERPRISES, INC., et al.,	§	
Plaintiffs,	§	CIVIL ACTION NO.
v.	§	H-97-0196
THE CITY OF HOUSTON,	§	
Defendant.	§	

SUPPLEMENTAL MEMORANDUM OPINION AND ORDER

(Filed Jun. 11, 1998)

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I. *INTRODUCTION*

In this action, Plaintiffs challenge thne validity of Ordinance 97-75 ("Ordinance"), the City of Houston's most recent amendments to its sexually oriented business regulatory ordinance. On February 18, 1998, the Court issued a Memorandum Opinion and Order ("Summary Judgment Opinion"),[1] which disposed of the majority of Plaintiffs' claims through summary judgment.[2] Since that

[1] On June 9, 1998, the Court issued an Amended Memorandum Opinion and Order [Doc. # 472], which incorporates corrections, primarily of a clerical nature, to the original Memorandum Opinion and Order [Doc. # 331]. These corrections are described in a *Nunc Pro Tunc* Order [Doc. # 471], also issued on June 9, 1998. All citations here to the "Summary Judgment Opinion" are to the Amended Memorandum Opinion and Order [Doc. # 472], filed on June 9, 1998.

[2] In footnotes 4 through 12 of the Summary Judgment Opinion, the Court identified the Plaintiffs in this action, based on the pleadings that were on file at the time the Opinion was issued. Since that time, the parties have brought to the Court's attention several errors on those lists. Thus, these footnotes should not be relied upon for complete and

(Continued on following page)

time, all the parties have submitted Motions for Reconsideration, in which they urge the Court to revise its rulings on various issues, as well as miscellaneous other motions and evidentiary objections.

This Supplemental Memorandum Opinion and Order ("Reconsideration Opinion") addresses the pending motions and objections,[3] as well as three major issues that

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accurate identification of all Plaintiffs in this action. In the *Nunc Pro Tunc* Order [Doc. # 471], the Court requested the parties to submit a stipulation containing the definitive list of Plaintiffs.

[3] There is currently an issue as to whether the Court has jurisdiction to consider the City's Motion for Reconsideration [Doc. # 364] because the City has filed an appeal of the Court's rulings that were adverse to the City in the Summary Judgment Opinion. Plaintiffs have filed a motion, that is currently pending in the Court of Appeals, to dismiss the City's appeal as premature. The Dee & Dee Plaintiffs argue that, by filing the appeal, the City has divested this Court of jurisdiction to consider the City's Motion for Reconsideration. *See* Dee & Dee Plaintiffs' Response to City's Motion for Reconsideration [Doc. # 404], at 1-2. In the interest of efficiency and because the Court expects the Fifth Circuit to find that the City's appeal is premature, the Court will address the City's Motion for Reconsideration at this time. At the conference held on March 2, 1998, the Court issued a final appealable order *only* with respect to the denial of the stay pending completion of this case and appeal of the three-foot and no-touch rules. As demonstrated by the fact that the Court did not issue a final judgment along with the Summary Judgment Opinion, which granted summary judgment on many, but not all, of the issues raised by the parties, the Court did not intend for any of its other rulings to be final. *See* Fed.R.Civ.P. 54(b) (district court order that adjudicates fewer than all the claims in a lawsuit is not appealable unless district court clearly enters final judgment on adjudicated claims); *Kelly v. Lee's Old Fashioned Hamburgers, Inc.*, 908 F.2d 1218, 1219-20 (5th Cir.1990) ("Where neither the order appealed from nor related portions of the record reflect an intent by the district judge to enter a partial final judgment, we refuse to consider the order appealable as a final judgment."); *Pettinelli v. Danzig*, 644 F.2d 1160 (5th Cir. Unit B 1981). If, however, the Fifth Circuit concludes that the City's appeal was proper and that this Court lacks jurisdiction to consider the City's Motion for Reconsideration,

(Continued on following page)

were not resolved by the Summary Judgment Opinion: (1) the constitutionality of the Ordinance's new formula regarding multifamily dwellings; (2) the constitutionality of applying the Ordinance's prohibition against providing adult entertainment in enclosed areas to Plaintiff Ice Embassy's large VIP room; and (3) the applicability of Tex.Loc. Gov't Code § 216 to the Ordinance's extension of its previous signage regulations.

In sum, the Court rejects most of the parties' requests for reconsideration and reaffirms its previous rulings, with the following exceptions. First, the Court withdraws its ruling that the addition of public parks to the Ordinance's list of protected land uses is constitutional; the Court rules instead that, although the addition of parks is a content-neutral act by the City, there is a genuine issue of material fact regarding the number of permissible sites that would exist for adult businesses under this amendment and thus that the constitutionality of this amendment cannot be determined through summary judgment at this time.[4] Second, the Court withdraws its ruling that invalidated the requirement that entertainers in adult establishments must wear identification cards while working; the Court now upholds this requirement for both entertainers and managers.[5] Finally, the Court withdraws its ruling that any entertainer or manager who was working in an adult business prior to the time that the individual permit requirement went into effect, who applied for a permit by

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then the sections of this Opinion that pertain to the City's Motion for Reconsideration, contained in Sections III.A., VIII.B.1., VIII.B.2.a., VIII.C., and VIII.F, may be disregarded.

[4] *See infra* Section III.B.2.

[5] *See infra* Section VIII.F.

the application deadline, and whose application was denied, must be allowed to continue working pending the completion of the entire judicial appeal of the applicant's permit denial; the Court now holds instead that such individual must be allowed to continue working for thirty days following the denial of the permit, while further relief may be sought from the state court by way of an application for an injunction or mandamus prohibiting the City's enforcement of the permit requirement pending judicial review.[6]

As for the issues left open following the issuance of the Summary Judgment Opinion, the Court concludes that, as with the new provision regarding public parks, it cannot determine the constitutionality of the new multi-family dwelling formula based on the current factual record; the Court will need further factual development regarding the number of permissible sites that would exist for adult businesses under this formula.[7] In addition, the Court concludes that the City cannot constitutionally apply the Ordinance's prohibition against providing adult entertainment in enclosed areas to Plaintiff Ice Embassy's large VIP room.[8] Finally, the Court holds that the City must comply with the provisions of Tex.Loc. Gov't Code § 216 before it may enforce the Ordinance's new signage provision.[9]

As a matter of convenience, this Reconsideration Opinion is organized to address the issues, to the extent

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[6] *See infra* Section VIII.A.2.

[7] *See infra* Section III.C.2.

[8] *See infra* Section VI.C.

[9] *See infra* Section VII.B.

possible, in the same order that they were addressed in the Summary Judgment Opinion.

II. *PLAINTIFFS' GLOBAL CHALLENGE TO THE ORDINANCE*

In the Summary Judgment Opinion, the Court struck down new restrictions in Ordinance 97-75 that would have required all adult businesses in the City to be located at least 1,500 feet away from certain protected land uses, including schools, churches, daycare centers, public parks, and residential areas. The Court based this ruling on its conclusion that the City Council's decision to enact the new 1,500 foot distance requirements was content-based and therefore subject to strict scrutiny under the First Amendment. *See* Sum. Jmt. Opinion, Section V.B.3.a. The Court concluded, however, that most other amendments to the Ordinance were content-neutral and, when evaluated under intermediate scrutiny, were constitutional.

In their Motions for Reconsideration, the A.H.D. and Dee & Dee Plaintiffs argue that the Court's holding that City Council members enacted the new distance requirements in Ordinance 97-75 in a content-based manner should apply to the entire Ordinance and not just the distance requirements. *See* A.H.D. Plaintiffs' Motion for Reconsideration [Doc. # 370], at 1-4; Dee & Dee Plaintiffs' Corrected Motion for Reconsideration [Doc. # 376], at 1-4.[10]

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[10] The Dee & Dee Plaintiffs' Corrected Motion [Doc. # 376] supersedes two earlier Motions for Reconsideration filed by these Plaintiffs [Docs. # 369 and 375]. Plaintiffs' Motion for Leave to File their Corrected Motion [Doc. # 374] is **GRANTED**.

In support of this contention, the A.H.D. Plaintiffs cite comments by City Council members that the Court quoted in the Summary Judgment Opinion, at 95-97, as well as other comments that allegedly demonstrate content-based intent. Plaintiffs urge the Court to recognize that these comments were not made exclusively in the context of the Sexually Oriented Business Committee's discussions about new distance requirements. Instead, they argue that these comments demonstrate that *all* provisions of the Ordinance were passed by the Committee with the specific intent of closing down many, if not most, of the City's sexually oriented businesses.

The Dee & Dee Plaintiffs strenuously argue that the Committee's intent cannot be severed with respect to different provisions of the Ordinance. In other words, Plaintiffs contend, if the Committee acted with content-based intent as to one set of provisions, then it must have acted with content-based intent as to all the provisions. Plaintiffs therefore request that the Court reconsider its Summary Judgment Opinion by declaring the entire Ordinance to be content-based and striking the Ordinance down in its entirety under First Amendment strict scrutiny.[11]

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[11] The City argues that it was appropriate for the Court to reach different conclusions regarding various provisions of the Ordinance, noting that the Ordinance contains a severability clause. *See* Ordinance 97-75, § 11. However, Plaintiffs are correct that the severability clause is not relevant to this issue. The issue is not whether the Ordinance can, as a matter of law, be upheld in some respects and stricken down in others. Instead, Plaintiffs are arguing that it is simply not possible for the City Council to have had one, lawful, intent regarding some provisions of the Ordinance and another, unlawful, intent regarding others.

The Court declines Plaintiffs' invitation and largely reaffirms its previous holdings regarding which provisions of the Ordinance were enacted in a permissible content-neutral manner and which were enacted in an impermissible content-based manner. As the Court explained in its Summary Judgment Opinion, statements by City Council members are *relevant* to, but not *dispositive* of, the issue of the City Council's intent as an entity. *See* Sum. Jmt. Opinion, at 809 n. 114 (citing *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986)). The Court quoted statements made by City Council members illustrating a content-based intent merely to augment the factual basis for its conclusion that the Ordinance was in part enacted in an impermissible content-based manner. However, the Court also explained that:

> The mere fact that Council members made the statements cited above does not preclude the City's enactment of valid increases in the distance requirements it imposes on adult businesses. Had these statements been supplemented by substantive legislative evidence about the need for *increases* in the distance requirements to alleviate or to address identified secondary effects, or even specific discussion as to why the previous distances were not sufficient, the Court may well have found the new distance requirements to be content-neutral. However, the record does not contain any specific discussion by witnesses or City Council members of this nature.

Sum. Jmt. Opinion, at 810.

As the Supreme Court established in *City of Renton* and the Fifth Circuit elaborated on in *SDJ, Inc. v. City of Houston*, 837 F.2d 1268 (5th Cir.1988), the primary test

that a court must apply in order to determine whether regulations on sexually oriented businesses are content-based or content-neutral is whether the legislative body considered evidence that such regulations would combat negative secondary effects associated with sexually oriented businesses. In its Summary Judgment Opinion, this Court applied the following test articulated by the Fifth Circuit in *SDJ*:

> [A]s the Court explained in *City of Renton,* a city may establish its "substantial interest" in the regulation by compiling a record with *evidence that it may be "reasonably believed to be relevant to the problem that the city addresses."* [475 U.S. at 51-52, 106 S.Ct. 925] We do not ask whether the regulator subjectively believed or was motivated by other concerns, but rather whether an objective lawmaker could have so concluded, supported by an actual basis for the conclusion. Legitimate purpose may be shown by reasonable inferences from specific testimony of individuals, local studies, or the experiences of other cities. This level of scrutiny best accommodates the need to ensure proper purposes with the limited competence of courts to discern ephemeral legislative motivations.

Sum. Jmt. Opinion, at 777 (quoting *SDJ,* 837 F.2d at 1274). Applying this test, the Court scoured the legislative record and found evidence tying almost all of the provisions of Ordinance 97-75 to negative secondary effects, except for the new distance requirements and several other limited requirements.

Applying the test dictated by *City of Renton* and *SDJ,* the Court must determine legislative intent primarily by examining the legislative record for evidence of negative

secondary effects and cannot rely on the more precarious exercise of discerning ephemeral legislative intentions from statements of individual legislators. It is very possible, as is the case in the suit at bar, that, under this test, a city may satisfy its constitutional burden as to some regulations, but not as to others. Even if the City Council did act with improper motivation regarding the entire Ordinance, under the applicable law, the fact that the City was nevertheless able to justify some portions of the Ordinance with evidence in the legislative record upon which *an objective lawmaker could have relied* in forming a content-neutral intent, then the Court must conclude that those portions of the Ordinance are content-neutral and must subject those portions to intermediate scrutiny.[12]

In addition, the Dee & Dee Plaintiffs argue that, in order to determine whether a City Council member could have reasonably relied on the evidence contained in the legislative record to conclude that various provisions of the Ordinance would address negative secondary effects associated with adult businesses, the Court needs to make some determination regarding the probativeness and reliability of the evidence in the record. *See* Dee & Dee Plaintiffs' Motion for Reconsideration [Doc. # 376], at 8-10. In support of this argument, Plaintiffs quote statements from *SDJ* which this Court also quoted in its Summary Judgment Opinion:

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[12] Although cases abound in which courts have upheld sexually oriented business ordinances in part and struck them down in part, *see, e.g., SDJ,* the Court has not found any other cases in which a court reached different opinions concerning the content-neutrality of various provisions of the same ordinance. As the Dee & Dee Plaintiffs note, this may well [sic] because this is the first case that presents such a situation.

> [E]vidence of legitimate purpose is supported by proof that secondary effects *actually exist* and *are the result of the business subject to the regulation*. . . . We do not ask whether the regulator subjectively believed or was motivated by other concerns, but rather whether an objective lawmaker could have so concluded, supported by an *actual basis* for the conclusion.

Sum. Jmt. Opinion, at 777 (quoting *SDJ,* 837 F.2d at 1274).

Plaintiffs in essence ask this Court to assume a legislative function – which the Court cannot and will not do. It was the role of City Council, consisting of duly elected and representative officers, to weigh the competing policy arguments, as reflected in their ultimate votes on the final version of Ordinance 97-75. This Court will not second-guess those judgments where the record before the Council, its Committee, and legal staff contains evidence of even minimal quality and quantity sufficient to support the City's enacted legislation.

The Dee & Dee Plaintiffs also reassert the same arguments they raised previously that the Ordinance as a whole constitutes an unlawful taking of their businesses. In support of this argument, Plaintiffs contend that business owners should be compensated for the going concern value of their businesses if governmental action, such as the enactment of Ordinance 97-75, results in the effective end of their businesses. *See* Dee & Dee Plaintiffs' Corrected Motion for Reconsideration [Doc. # 376], at 22-24. However, Plaintiffs do not specify what provisions of the Ordinance they are challenging here that they claim

will cause their businesses to close.[13] In addition, Plaintiffs do not cite any new authority to persuade the Court to reconsider its rejection of their arguments that the Ordinance constitutes an impermissible taking. *See* Sum. Jmt. Opinion, at 822-23 & n. 137. The Court therefore reaffirms its rejection of the Dee & Dee Plaintiffs' takings argument.

III. *LOCATIONAL RESTRICTIONS*

A. *Increased Distance Requirements*

In its Motion for Reconsideration, the City requests that the Court reverse its prior invalidation of the Ordinance's increased distance requirements. The City argues that the Court's holding was in error because the new 1,500 foot distance requirements enacted in Ordinance 97-75 are content-neutral and therefore should be evaluated under intermediate scrutiny, rather than strict scrutiny. In support of this argument, the City contends that, contrary to the Court's holding, the legislative record contains adequate evidence of adverse secondary effects caused by adult businesses; that it was proper for the City to rely upon prior legislative history of adverse secondary effects in order to justify increasing the distance requirements; that isolated remarks by some City Council members do not indicate content-based legislative intent; that the City was not required to justify the specific increases in distances; and that City Council members were entitled to rely on evidence of negative secondary effects reviewed by others.

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[13] In the Court's prior ruling, Plaintiffs succeeded in their attack on the Ordinance's new distance requirements, which were the provisions most Plaintiffs specifically claimed would cause this result.

The Court has reviewed the City's arguments as well as the portions of the legislative record that it cites in support of its Motion for Reconsideration and reaffirms its earlier ruling invalidating the Ordinance's increased distance requirements. The City has not brought any new arguments nor evidence to the Court's attention on this issue. Nevertheless, in an exercise of caution and in order to detail its reasoning on the issue even further, the Court specifically addresses each of the City's arguments below.

1. Evidence in the 1996-97 Legislative Record

The City cites a number of portions of the legislative record which it claims constitute valid evidence of negative secondary effects caused by adult businesses upon which City Council members reasonably relied in increasing the Ordinance's distance requirements. However, as the Court noted in the Summary Judgment Opinion, none of this evidence indicates how these purported negative effects would be addressed by the expansion of the distance requirements, other than that increased distance requirements were expected to lead to the closing of the vast majority of existing adult businesses in the City.

Initially, the Court notes that, because the validity of the earlier distance requirements is not at issue in this case, the Court will not revisit the propriety of the City's earlier decision contained in the 1983 and 1986 Ordinances to require that adult businesses be located at least 1,000 feet away from residential areas and 750 feet away from other protected land uses. Based on the authority of the Fifth Circuit and district court's rulings in *SDJ,* the Court assumes that the pre-1996 legislative records

contained sufficient evidence demonstrating negative secondary effects caused by adult businesses that were located very close to the protected land uses and therefore justified the enactment of some distance requirements.[14]

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[14] In *SDJ,* the district court cited the following Houston legislative materials from which that court determined that the initial distance requirements were content-neutral: the 1983 Legislative Report of the City's Sexually Oriented Business Committee, at 7-9, and the 1986 Amended Legislative Report, at 6-11. *See SDJ, Inc. v. City of Houston,* 636 F.Supp. 1359, 1364-65 (S.D.Tex.1986). These reports are contained in the Briefing Book for the 1996-97 Committee, Exhibit 1, Tabs 2 and 3, to the City's Motion for Summary Judgment [Doc. # 120]. These cited materials provide specific references to documented negative secondary effects that the initial distance requirements were expected to address. For example, the 1983 Legislative Report states that the Sexually Oriented Business Committee concluded, based on testimony gathered at a public hearing, that

> sexually oriented businesses are likely contributory factors to criminal activities that are encouraged as ancillary to these enterprises . . . [and that] the criminal activity that does tend to occur in the vicinity of sexually oriented businesses, particularly where those businesses have clustered, has an adverse effect on property values.

1983 Legislative Report, at 8. In addition, the Committee received specific evidence regarding sexually oriented businesses and property values:

> Several real estate brokers with substantial experiences in areas affected by sexually oriented businesses offered documented instances in which property values had been affected by the establishment of sexually oriented businesses.

1983 Legislative Report, at 7. Three years later, the Committee assessed the impact of the 1983 Ordinance and "found that the [1983] Ordinance . . . had a substantial positive impact on encouraging neighborhood stability and economic development." 1986 Legislative Report, at 9. Nevertheless, the Committee found that negative secondary effects continued to exist, in part due to the fact that the 1983 Ordinance had not covered sexually oriented businesses licensed to sell alcoholic beverages. The 1986 Committee justified enacting amendments to the Ordinance, that expanded the Ordinance to cover sexually

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However, there is no evidence in either the earlier legislative records or in the legislative record for Ordinance 97-75 upon which a City Council member could have reasonably relied to conclude that the earlier distances of 750 and 1,000 feet (which are more than the length of two football fields) were not adequate to address the negative secondary effects documented in the earlier legislative records. Nor is there evidence, based on the experience of Houston or any other city, that a city could reduce secondary effects more effectively by implementing distance requirements as great as 1,500 feet or by increasing previously enacted distance requirements. The record contains simply no information from which a City Council member could have inferred that negative secondary effects would be reduced by increasing the Ordinance's distance requirements, other than through its likely effect of shutting down most of the adult businesses in the City. The only possible inference the Court can conceive, as to why the City desired to impose greater distances, is that the City assumed that greater distances would force more adult businesses to close.[15]

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oriented businesses licensed to sell alcoholic beverages, based on findings that its earlier conclusions, from the 1983 Legislative Report, applied to this type of sexually oriented business as well. *See* 1986 Legislative Report, at 8.

See also discussion of prior legislative history *infra* in Section III.A.2.

[15] This inference is supported by the fact that, before enacting Ordinance 97-75, City Council members specifically requested information regarding how many businesses would be affected by the proposed amendments to the locational restrictions and were told that, under the amendments, 81% (103 out of 119) of City's businesses would have to close or relocate. *See* Sum. Jmt. Opinion, at 812 (citing Exhibit 19C to City's Motion for Summary Judgment [Doc. # 120]). While the Court

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The City argues generally that the Court should not be so exacting as to demand that the City produce local studies or even evidence regarding experiences of other cities because, under *SDJ,* testimony from citizens regarding their own experiences is sufficient to justify the Ordinance's new restrictions as content-neutral. *See* City's Motion for Reconsideration [Doc. # 364], at 6. The Court does not disagree with the City on this point in principle; however, the Court notes that the portion of *SDJ* which the City cites in support of this argument indicates that "[l]egitimate purpose may be shown by reasonable inferences from *specific* testimony of individuals, local studies, or the experiences of other cities." 837 F.2d at 1274 (emphasis added). The City is correct that testimony of individuals may show legitimate purpose, but, as noted here, such testimony must be "specific."

Before ruling on the summary judgment motions, the Court examined the entire legislative record for Ordinance 97-75 and found no testimony by citizens that specifically described negative secondary effects on the protected land uses caused by existing adult businesses. In its Motion for Reconsideration, the City cites portions of the record that it insists support the increased distance requirements. The Court has examined this evidence again and concludes that none of this testimony from individuals is sufficiently "specific" to justify the substantial increased distance requirements as content-neutral under the standard of *SDJ.*

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does not place great reliance on this evidence, it merely notes it to show that the City Council was aware of the dramatic adverse impact the new locational amendments would, in combination, have on sexually oriented businesses.

Citations to Houston's Legislative Record. – An example of the testimony upon which the City relies is a letter that a City resident sent to the Mayor and City Council that states:

> Houston has more S.O.B.s than any other city per capita and with them come the prostitution, drug dealing, drunk driving, vandalism, reckless driving, vagrants, panhandlers, auto thefts, burglary of motor vehicles, rapes, graffiti, burglaries, etc. Avondale has more crime than all the rest of Central One and new S.O.B.s continue to impact the Montrose and Kirby Districts. Crime has also climbed in The Original Hyde Park and other areas of Montrose.

Letter from Patsy M. Teer, Exhibit 22A to City's Motion for Summary Judgment [Doc. # 120], at 44. This letter does not assist the City under the applicable legal standards. Conclusory statements that adult businesses are associated with increased crime in surrounding areas is not "specific" as required by *SDJ*. Moreover, this letter makes no reference to adult businesses' impact on protected land uses nor any reference as to how increasing the distances between adult businesses and protected land uses would alleviate the crime described in the letter. The author appears simply to object categorically to the existence of adult businesses. The prime – if not only – inference to be drawn from this letter is that the author wants the City to take measures to reduce the number of adult businesses regardless of their precise proximity to protected land uses. Nothing in the letter mentions schools, churches, daycare centers, or even residences. Nothing in the letter indicates that the author believes that the problem with adult businesses is the negative secondary effects they create by their *excessive proximity* to protected

land uses. The City's decision to increase the buffer zones around protected land uses in response to citizen complaints such as this one was clearly a ruse for simply decreasing the number of adult businesses that would be allowed to stay open.

The City also cites a number of portions of the record in which citizens specifically suggested that the distance requirements between adult businesses and protected land uses be increased. *See* City's Motion for Reconsideration [Doc. # 364], at 4-5 (citing City's Motion for Summary Judgment [Doc. # 120], Exhibit 3H, at 27-28, 61, 72-73, 119, 121; Exhibit 5B, at 85; Exhibit 22A, at 2, 11-12, 45-46, 66-75, 93-95, 104-05; and Exhibit 22B, at 27-34). However, these portions of testimony is not evidence of negative secondary effects. These portions of testimony are merely evidence of a suggested strategy for reducing the prevalence of adult businesses in Houston, made by people who expressly indicated their dislike for the existence of these businesses in the City. Unlike evidence in the record that supported, for example, visibility requirements inside adult businesses in order to decrease the occurrence of public lewdness, this evidence does not in any way tie a potential restriction – increased distance requirements – to negative secondary effects. There is simply no evidence in the record suggesting that negative secondary effects that adult businesses purportedly inflict *outside* of their premises are caused by the adult businesses being located too close to the protected land uses or suggesting that these putative secondary effects could be reduced if the businesses were simply required to move somewhat further away.

The City argues that, even if testimony in the record does not specifically address the precise distances that

have been or could be required, evidence in the record regarding citizens' generalized complaints about adult businesses is sufficient to meet the City's burden. The City claims that this generalized evidence constitutes content-neutral justification for the increased distance requirements because the citizens had these complaints at the time that the earlier distance requirements were in effect and therefore this evidence shows the inadequacy of the earlier requirements in combatting negative secondary effects created by adult businesses. *See* City's Motion for Reconsideration [Doc. # 364], at 5-6 (citing City's Motion for Summary Judgment [Doc. # 120], Exhibit 3H, at 34, 61-62, 82-83, 89, 116, 119-20; Exhibit 5B, at 60-62, 75-82, 88; Exhibit 22A, at 35-36, 39, 60-64, 79-80, 107). However, a review of this cited evidence[16] reveals simply more content-based condemnation of adult businesses[17] and

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[16] Much of this evidence is the same evidence that the City cited in its Motion for Summary Judgment and that the Court specifically addressed in its Summary Judgment Opinion. In its Motion for Reconsideration, the City has largely repeated arguments from its summary judgment motion without addressing the specific concerns the Court raised regarding the usefulness of this evidence. The Court has closely examined the evidence cited by the City and finds that it cannot rely on the City's assurances that its arguments are supported by its lengthy string cites to the legislative record such as the one cited above in the text. Indeed, one piece of evidence from this string cite comes from a citizen *opposed* to the City's regulation of adult businesses. *See* Exhibit 22A to City's Motion for Summary Judgment [Doc. # 120], at 39.

[17] For example, in a letter to Committee Co-Chair Helen Huey cited by the City, a resident writes that adult businesses "are demoralizing and demeaning to all those involved . . . Do we really want business and professional leaders with this kind of mentality to lead us in our community? . . . This city is in trouble if it doesn't clean up its act. We must put an end to this." Exhibit 22A to City's Motion for Summary Judgment [Doc. # 120], at 79-80.

strategies for eliminating them.[18] This evidence includes no discussion of secondary effects created by adult businesses. To the extent that these citizens complained about the inadequacy of the previous distance requirements, their complaints were not that the previous requirements did not go far enough toward reducing adverse secondary effects but were instead that they did not go far enough toward eliminating adult businesses altogether.

Much of the evidence of residents' ongoing complaints about adult businesses does not even address negative secondary effects, such as crime and property values.[19] Of

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[18] The City cites testimony like comments by one resident who discussed with a Council member how to stop expansion of adult businesses in various neighborhoods, including strategies such as creating variable distance requirements depending on the neighborhood. *See* Transcript for July 29, 1996, Public Hearing, Exhibit 5B to City's Motion [Doc. # 120], at 60-62. However, there is no evidence of what secondary effect the resident or Council member were seeking to address. Rather, the only goal articulated is closing, or at least arresting the growth of, adult businesses.

[19] For example, the City once again cites oral testimony by Dolly Madison McKenna, who stated that "I drive by the location where this [proposed new adult] business is going to be every single day of my life and I do not want to have to explain to my daughter what people are doing there." Transcript for July 15, 1996, Public Hearing, Exhibit 3H to City's Motion for Summary Judgment [Doc. # 120], at 83. The City also cites testimony that contains nothing more than conclusory opinions such as "we do not need sexually oriented businesses in residential areas." *Id.* at 116. Much of the evidence is from residents concerned about the possible opening of an adult cabaret, Rick's, in an upscale neighborhood. The City cites complaints about this proposed cabaret location that include concerns about alcohol sales and traffic congestion in the neighborhood with no reference to negative secondary effects related to its status as an adult business. *See* Exhibit 22A to City's Motion for Summary Judgment [Doc. # 120], at 60-64. Moreover, since the proposed business had not opened when the letters were written (and there is no evidence that it ever opened), these letters were not addressing secondary effects of any actual business. The

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the evidence that does address these issues, each is a speculative opinion or conclusory statement, rather than an observation of provable or specific facts.[20] Also, much of the evidence simply does not connect these issues specifically to adult businesses. For example, the City cites oral testimony by a resident describing a proposed new location for an adult business near residential homes; the evidence consists of the resident's statement that "I'm going to feel quite bad for the people who have children and the kind of

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letters instead constitute mere speculation about issues such as traffic congestion, which, if factually based at all, would have applied to any popular large restaurant. Thus, these letters lack any relevance to secondary effects of adult businesses.

[20] For instance, the City also cites a letter in which a resident states that:

> We strongly feel that the location of any Sexually Oriented Business so close to existing residential neighborhoods is detrimental to efforts to maintain and improve the quality of daily life in Houston. I am particularly concerned about the reported incidence of crime and police complaints in residential neighborhoods in the vicinity of Sexually Oriented Businesses and, in particular, in the vicinity of Rick's Cabaret on Richmond.

Exhibit 22A to City's Motion for Summary Judgment [Doc. # 120], at 107. Although this letter could have provided support for the City's decision to increase the minimum distance between adult businesses and residential neighborhoods, it contains only a passing conclusory reference to reports of crime in the vicinity of adult businesses. The record, however, contains no actual evidence of crime outside the cabaret mentioned, or any other adult business, and no mention of how close any crimes purportedly related to any adult business are to residences or other protected land uses. Thus, the letter is mere over-generalized speculation and does not constitute evidence upon which City Council members could have reasonably relied in determining that the previous distance requirements were inadequate and that there was a fact-based reason for the extending the distances to 1,500 feet.

crowd that that place is going to attract for their families and their property values and such." Transcript for July 15, 1996, Public Hearing, Exhibit 3H to City's Motion for Summary Judgment [Doc. # 120], at 34. Another resident testified about his fears regarding that same proposed business moving into his neighborhood:

> I just want to say if Rick's is allowed to proceed in that location that I believe the City would be degraded, that my community will be degraded, that my home value will be impaired and I know that I, my wife and my two children will be confronted at least twice everyday and sometimes many more times each day with the spectacle of sex for sale as we pass by that location.

Id. at 120.[21]

Although these condemnations of adult businesses contain passing references to property values, these statements are not actual evidence that adult businesses are causing, or may cause, reduced values for property located more than 750 or 1,000 feet away from the businesses.

Therefore, while some evidence in the new legislative record contains superficial references to topics that might,

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[21] As another example, the City cites testimony from a resident claiming that she "was stalked by a car who thought that I was a hooker" and that her son has been stalked as well. Transcript for July 15, 1996, Public Hearing, Exhibit 3H to City's Motion for Summary Judgment [Doc. # 120], at 61-62. However, this resident does not even indicate whether she or her son were near an adult business when they saw the alleged stalkers. The City also cites McKenna's testimony that "I do not want to have my son harassed on the street"; this vague testimony is also not connected to any existing or potential adult business. *Id.* at 83.

at first blush, appear relevant to secondary effects, a parsing of these cited materials reveals no specific evidence that supports the increased distance requirements as content-neutral amendments. Rather, the portions of the record cited by the City contain no more than general diatribes against adult businesses and indicate residents' desire to eliminate these businesses if at all possible.

Had there been fact-based references to the inadequacy of the current distance requirements and specific reasons why the 1,500 foot distance requirements – or simply some other distances greater than those contained in the previous version of the Ordinance – would address factually supported inadequacies of the current requirements, this Court would have upheld the new requirements. No such evidence exists, however, in this record.[22]

The City also claims that the legislative record for Ordinance 97-75 contains actual studies and evidence from other cities regarding the impact of adult businesses on surrounding areas. *See* City's Motion for Reconsideration [Doc. # 364], at 13. In support of this claim, the City cites the City Council's Sexually Oriented Business Committee Briefing Book, Exhibit 1 to City's Motion for Summary Judgment [Doc. # 120], Tab 2, at 16-21. These pages,

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[22] Evidence that the Court would have deemed adequate would have demonstrated, or at least suggested, that negative secondary effects spill out from adult businesses to distances greater than 1,000 feet with respect to residential areas and greater than 750 feet with respect to other protected land uses. Evidence that the 750 foot and 1,000 foot distance requirements were deemed by disgruntled citizens not to be working, simply because adult businesses still existed and the number of adult businesses in the City was growing, does not support the City's contention that the increased distance requirements were enacted for a content-neutral purpose.

however, do not discuss negative secondary effects found in other cities which could support the City's decision to increase its distance requirements. Instead, these pages merely describe what types of regulations a number of different cities have put into their sexually oriented business ordinances and whether the ordinances have stood up in court to constitutional challenges.[23] Moreover, none of the descriptions of regulations by other cities indicate that any city has implemented distance requirements as great as 1,500 feet; nor do any indicate that any city has experimented with increasing previously enacted distance requirements.[24]

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[23] In *SDJ,* the Fifth Circuit was persuaded that, in enacting an earlier version of the Ordinance, the Houston City Council considered actual studies of other cities. The Fifth Circuit emphasized that, when looking at the experiences of other cities, legislators must consider *more* than simply what ordinances have been adopted by those cities and been upheld by courts:

> While it may not be enough simply to tailor one ordinance to another that has survived judicial review, we are persuaded that the City Council considered those studies themselves and not merely the ordinances for which the studies provided support.

SDJ, 837 F.2d at 1274. Although such studies may have been included in the legislative record for prior versions of the Ordinance, *no such studies* are included in the legislative record for Ordinance 97-75. Instead, as indicated in the text, the only evidence regarding other cities in the record for Ordinance 97-75 is the summaries of the ordinances adopted by several other cities – and description of whether they withstood constitutional challenges.

[24] In support of its claim that the City Council relied on studies of other cities, the City also cites a portion of a transcript from one of the Committee's public hearings, in which Committee Co-Chair Helen Huey questioned a witness. *See* (Transcript for July 29, 1996, Public Hearing, Exhibit 5B to City's Motion for Summary Judgment [Doc. # 120], at 29-32). This dialogue, however, cited no evidence of negative secondary effects in other cities. *See* Sum. Jmt. Opinion, at 804 (quoting part of

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Other Cities' Records. – After examining numerous other cases involving cities' locational restrictions on adult businesses, the Court finds that the evidence proffered by the City of Houston in support of the increased distance requirements contained in Ordinance 97-75 is sorely lacking. Indeed, the City of Houston has made the most meager attempt at showing content-neutrality of its new locational restrictions of any case the Court has examined.

As one example of a city that compiled a satisfactory legislative record, the City of New York recently passed an ordinance that imposes similar locational restrictions on adult businesses to those contained in Ordinance 97-75. Under the New York ordinance, adult businesses must be located at least 500 feet away from schools, daycare centers, houses of worship, residential areas, and other adult businesses. *See Buzzetti v. City of New York,* 140 F.3d 134 (2d Cir.1998), *petition for cert. filed,* 66 U.S.L.W. 3774 (U.S. May 29, 1998) (No. 97-1900). Both the Second Circuit and New York's highest state court have upheld these locational restrictions as constitutional content-neutral enactments. *See id.; Stringfellow's of New York, Ltd. v. City,* 91 N.Y.2d 382, 671 N.Y.S.2d 406, 694 N.E.2d 407, 1998 WL 77749 (1998). In reaching this conclusion, the courts were persuaded that New York City decided, based on an extensive and directly pertinent legislative record, that these restrictions would be likely to combat negative secondary effects created by adult businesses. Specifically,

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this dialogue). Moreover, as the Court indicated in the Summary Judgment Opinion, this dialogue does not indicate that Huey even looked at the contents of the prior legislative history to which she was referring, let alone actually considered it, or shared the contents with other Council members.

the New York City Council received public testimony, examined studies of adult businesses conducted in nine other localities, conducted its own study in order "to identify the *specific* adverse secondary effects caused by adult establishments in New York City itself," and compared its new study to earlier studies of adult businesses in New York. *Id.* at 391, 671 N.Y.S.2d at 411, 694 N.E.2d at 412 (emphasis added). *See also Buzzetti,* 140 F.3d at 136. Its new study compared areas immediately near adult businesses to other areas and determined "that there were significant adverse impacts attributable to adult enterprises in the City, including downward pressure on property values and increased crime rate in areas where adult uses are most concentrated." *Stringfellow's,* 91 N.Y.2d at 391, 671 N.Y.S.2d at 411, 694 N.E.2d at 412. The study revealed that "[m]ore than 80% of the real estate brokers responding to the survey reported that an adult establishment tends to depress the market value of property within 500 feet." *Id.* at 398, 671 N.Y.S.2d at 415, 694 N.E.2d at 416. Another study considered by the New York City Council also used control groups and reached similar results.[25]

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[25] This study identified four study blocks (those containing at least one adult enterprise) and four neighboring control blocks (those with no sex-related establishments), and then compared those data with similar statistics for the District as a whole, the wider Times Square area, all of Manhattan, and all of New York City. The data included crime statistics, property valuations and 53 formal interviews with business and real estate enterprises. . . . [Among other findings,] [t]he study also found significant "patterns," notably that there were many more criminal complaints on the study blocks than the control blocks and that the heaviest incidence of prostitution arrests occurred in the three block study area of dense concentration of adult establishments.

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The Court does not hold that the legislative record compiled by the City of New York sets any minimum standard of what type and amount of evidence would be sufficient to demonstrate content-neutral intent. However, this case serves as an important source of comparison because it shows what kind of specific data and evidence of actual secondary effects a city could evaluate if it were truly interested in undertaking a content-neutral approach to regulating the locations of adult businesses. Had some of this type of evidence been present in the legislative record for Ordinance 97-75, this Court may well have determined that the increased distance requirements were permissible content-neutral enactments.

It should be noted that the adequacy of New York's legislative record cannot remedy the inadequacy of Houston's legislative record. First of all, the City of Houston does not claim that anyone advising the Houston City Council ever saw the New York evidence. In any event, because cities differ in their characteristics, such as geographic layout and population and building density, the mere existence of studies in New York or other cities regarding secondary effects of adult businesses does not support the increased distance requirements the Houston City Council enacted in Ordinance 97-75.[26] In any event, neither the Houston City Council nor this Court has any

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Stringfellow's, 91 N.Y.2d 382, 398, 671 N.Y.S.2d 406, 415, 694 N.E.2d 407, 416.

[26] For example, in New York, residential areas are far more densely populated than they are in most of Houston. Also, in New York, people generally do not own cars and instead they frequently walk or use public transportation, whereas, in Houston, private cars are a more common means of transportation. Thus, adult businesses might have different effects on surrounding areas in New York and in Houston.

pertinent information regarding the relevance to Houston of studies from other cities because Houston City Council members undertook no consideration of this issue. Current case law does not permit a city simply to presume that the mere existence of studies of negative secondary effects caused by adult businesses in other cities automatically renders its own restrictions on adult businesses content-neutral. A city is not required to conduct its own studies, but it must rely on evidence that may "reasonably believed to be relevant to the problem that the city addresses." *City of Renton,* 475 U.S. at 51-52, 106 S.Ct. 925. In the case at bar, neither Houston City Council members nor witnesses discussed any similarities or differences between Houston and other cities. Furthermore, there is no indication in the record that the Council ever considered whether specific studies from other cities, which are vaguely referred to but are not even contained in the actual legislative record, might be relevant to Houston.

2. Prior Legislative History

The City contends that the Court erred in its Summary Judgment Opinion by holding that, in enacting the increased distance requirements in Ordinance 97-75, the City could not rely upon the legislative record for prior versions of the Ordinance. The City argues that, in *City of Renton,* the Supreme Court specifically held that local governments do not need to conduct new studies of negative secondary effects in order to regulate adult businesses but could instead rely upon evidence found in studies of other cities. *See* 475 U.S. at 51, 106 S.Ct. 925. Presumably, the City contends that if it could have relied upon evidence from other cities, then surely it could rely upon its own prior evidence. In support of this point, the City also cites

Schleuter v. City of Fort Worth, 947 S.W.2d 920, 926-27 (Tex.App. – Fort Worth 1997, writ denied), in which a Texas court rejected the argument that the City of Fort Worth's failure to conduct new studies each time it enacted amendments to its sexually oriented business ordinance showed that the amendments were not intended to limit negative secondary effects.

The City has misread this Court's original holding on this issue. This Court never held that the City of Houston had to conduct new studies or even conduct its own studies in order to document negative secondary effects. A city's reliance on past studies or studies from other cities would be sufficient to demonstrate content-neutrality so long as someone involved in the legislative process actually relied on the studies, *see Lakeland Lounge of Jackson, Inc. v. City of Jackson,* 973 F.2d 1255, 1258 (5th Cir.1992), and "so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses," *City of Renton,* 475 U.S. at 51-52, 106 S.Ct. 925. In the Summary Judgment Opinion, the Court emphasized that, as a legal matter, the City *could have* relied upon its past legislative record in enacting amendments to its Ordinance. However, a review of the current record does not reveal that anyone involved in the drafting or enacting of Ordinance 97-75 *actually did* rely on the prior legislative records in determining that the new distance requirements would address negative secondary effects of adult businesses. *See* Sum. Jmt. Opinion, at 802-05 & nn. 102-03. In addition, the Court noted that, even if someone had looked at the prior record, the Court could not find any evidence in that record that could reasonably be considered relevant to the City's decision to *increase* the Ordinance's distance requirements or to use distance

requirements larger than the City had enacted earlier. *See* Sum. Jmt. Opinion, at 802-05.

In contrast, in *City of Renton,* the trial court concluded – on the record before it – that the city had indeed considered probative studies from other cities, and it was this conclusion that the Supreme Court affirmed. *See* 475 U.S. at 51, 106 S.Ct. 925. Likewise, in *Schleuter,* the court was able to discern that "the City relied on studies, its ongoing experiences, and public comment when adopting the ordinances *and their amendments.*" 947 S.W.2d at 927 (emphasis in original). This factual predicate is absent in the case at bar as to Ordinance 97-75.

3. Remarks by City Council Members

The City argues that the Court placed too much weight on isolated remarks by individual City Council members in reaching its conclusion that the Ordinance's new distance requirements were enacted in a content-based manner. In its Summary Judgment Opinion, the Court cited statements in the legislative record that clearly reflected content-based intent, *see* Sum. Jmt. Opinion, at 809-10, but emphasized that these statements alone would not have compelled the Court to reach this conclusion, *see id.* at 96 n. 114 ("[t]he Court recognizes that statements by individual City Council members are *not dispositive* of the intent of the City Council as an entity") (citing *City of Renton,* 475 U.S. at 48, 106 S.Ct. 925).[27] These statements were cited merely as further support of the Court's conclusion, which was founded on other evidence, that at least part of the Ordinance was

[27] *See also supra* at 6 (quoting Sum. Jmt. Opinion, at 810).

enacted with content-based intent.[28] The Court referenced the quoted comments merely to provide additional support for that conclusion.

In considering the legal relevance of statements by City Council members, the Court notes an interesting comparison between this case and *Dumas v. City of Dallas*, 648 F.Supp. 1061 (N.D.Tex.1986), *aff'd sub nom. FW/PBS, Inc. v. City of Dallas*, 837 F.2d 1298 (5th Cir.1988), *rev'd in part on other grounds*, 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990), which upheld locational restrictions on adult businesses in Dallas. In *Dumas*, the district court acknowledged that "[d]ivining the intent of a legislative body is inherently problematic." 648 F.Supp. at 1064. However, because the court had before it the entire legislative record – as this Court does in the case at bar – it noted that:

> Determining legislative intent here does not involve the thorny problems courts have associated with drawing intent from incomplete journals of

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[28] In the Summary Judgment Opinion, the Court primarily cited remarks by City Council members that directly indicated their individual intent. The legislative record also contains statements by City Council members that indicate less directly their intention of minimizing opportunities for sexually oriented businesses to stay open. For example, during one Committee meeting, in an exchange with Joseph Chow of the City's Planning Department, Co-Chair Huey asked whether the City would "be better off" using 1,000 feet or 1,500 feet as the radius for calculating whether an area is 75% residential. From Chow's response, it is clear that both he and Huey understood "better off" to mean fewer permissible sites for adult businesses. *See* Transcript of November 20, 1996, Committee Meeting, Exhibit 15C to City's Motion [Doc. # 120], at 13 (Chow responded that "it may not be advisable to go back" to 1,000 feet and that "it may still be advantage[ou]s to do the 1500" because fewer parcels of land would be available for adult businesses using a 1,500 foot radius).

> congressional debates. The record here reflects the entire remarks of each legislator and witness, and the Court may divine intent from the proceedings as an integrated whole.

Id. at 1064 n. 7 (citations omitted).

The *Dumas* court recognized that a number of non-legislator citizens who supported the Dallas ordinance may well have been acting with content-based intent. However, the court determined that such an intent could not be attributed to members of the Dallas City Council, explaining that:

> There is little doubt that the most vocal supporters of the ordinance – from such groups as the Dallas Association for Decency, the American Renewal Foundation, and the Citizens for Decency Through Law – applauded the ordinance for its incidental impact on speech. Although such witnesses may have had the intent to zone sexually oriented businesses out of existence by a law that was the strongest vehicle toward elimination of such businesses, the City evinced no such illegal motive.

Id. at 1065 n. 11 (citations omitted). The court concluded that the Dallas legislators did not rely on this content-based motive but instead acted with content-neutral intent because the record revealed that they had considered studies of secondary effects of sexually oriented businesses in other cities, as well as a controlled study in Dallas that compared crime rates in areas near sexually oriented businesses to the city as a whole. *See id.* at 1065 n. 10. In addition, the court was persuaded that City Council

members sufficiently distanced themselves from the clear content-based intentions of some of their constituents.[29]

In contrast, the statements made by Houston City Council members that were attempts to show content-neutrality regarding the Ordinance's increased distance requirements were little more than half-hearted attempts to distance themselves from citizens who clearly supported increasing the distances because they opposed the protected activities that occur inside adult businesses. While some Houston City Council members may have acknowledged that adult businesses have First Amendment rights, *see* Sum. Jmt. Opinion, at 809-10,[30] these statements are

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[29] According to the court,

> Five of the 15 members of the Commission and four of the 11 members of the Council stated unequivocally – to no dissent – that the Ordinance was concerned solely with controlling the secondary effects of sexually oriented businesses on surrounding neighborhoods. Both groups stated that they were concerned not with the content of the speech associated with sexually oriented businesses, but with the crime, urban blight, and plummeting property values that inevitably seize the neighborhoods where such businesses locate. . . . It is of no moment that the public speakers in favor of the Ordinance supported it almost singularly in hopes that it would indeed suppress the speech purveyed by sexually oriented businesses, as neither the Council nor the Commission relied on the specious view that pornography "causes" various social ills and should thus be eliminated.

Dumas, 648 F.Supp. at 1064-65 (citations omitted).

[30] These acknowledgments included statements such as the following from Co-Chair Boney:

> We are quite sensitive and cognizant of the fact that sexually oriented businesses are constitutionally protected. There will be no efforts or intentions or actions by this mayoral council to eliminate sexually oriented businesses for the City of Houston because, quite frankly, the United States

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not the type made by Dallas legislators that showed that the proposed restrictions were actually intended to address specified negative secondary effects, such as crime outside the adult businesses or decreased property values, based on some factual analysis.[31]

Supreme Court has already determined that they do have a right to exist under the First Amendment.

Sum. Jmt. Opinion, at 810 (quoting Transcript of July 15, 1996, Public Hearing, Exhibit 3H to City's Motion for Summary Judgment [Doc. # 120], at 6). In the Summary Judgment Opinion, the Court cited these statements as showing that some Committee members "paid lip service to the fact that sexually oriented businesses receive some protection under the First Amendment" but held that:

> this type of conclusory statement does not satisfy the City's burden of showing that the Ordinance's new distance requirements were enacted in order to address negative secondary effects associated with the businesses. Mere recognition that constitutional issues are at stake does not satisfy the constitutional requirements for imposing restrictions on protected speech.

Sum. Jmt. Opinion, at 810.

[31] According to the *Dumas* court, the Dallas Commission and Council members made remarks such as:

- "[T]he content has absolutely nothing to do with it."
- "[I]t isn't the product itself that we're attempting to address here, but rather it's the problems that are caused by a certain type of business."
- "[W]e're not deciding today whether people should or should not read, watch, do any of these activities."
- "[The] compelling government objective [is] controlling the crime associated with the concentration of commercial establishments of this type."

Dumas, 648 F.Supp. at 1064 n. 8.

Unlike the statements by the Dallas legislators, some statements by Houston City Council members do not reveal any attempt to distance themselves from their constituents' content-based viewpoints. *See* Sum. Jmt. Opinion, at 809-10 (quoting Co-Chair Huey's statement

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Discussions by the Houston City Council Sexually Oriented Business Committee indicate a clear understanding by Council members that the goal of increasing the Ordinance's distance requirements was simply to eliminate as many opportunities for adult businesses to operate in Houston as possible. This implication stems from the fact that the distance requirements discussions focused exclusively on the issue of how many alternative sites various proposed increases would allow.[32] Thus, rather than increasing the Ordinance's distance requirements in order to better address negative secondary effects, the record reveals that the City Council enacted the increase only in order to reduce the number of parcels available for adult businesses.

4. Justification for Specific Increases

The City argues that the Court has held it to too high of a standard to show that its new distance requirements were specifically justified by evidence in the legislative record. The City contends that, once secondary effects have been demonstrated, the choice of a particular distance,

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that "[a]ll of us hear the pleas to just outlaw such businesses. Even though most (maybe all) of us would personally like to do so, we cannot").

[32] In his reports to the Committee regarding the Planning Department's progress on the project of calculating numbers of available sites, Joseph Chow indicated his understanding that the Committee wanted him to figure out what new restrictions would provide the greatest reductions in the number of available sites without bringing the number down so low as to create legal difficulties. For example, at one meeting he reported that: "[b]y using [a 1,500 foot distance], we were able to reduce the number of parcels inside the city down to 9,928." Transcript of November 20, 1996, Committee meeting, Exhibit 15C to City's Motion for Summary Judgment [Doc. # 120], at 3.

rather than some other distance, was within the ambit of the City's legislative discretion.

In its Summary Judgment Opinion, the Court agreed that the City "has the prerogative of experimenting with different possible solutions to municipal problems even when dealing with First Amendment interests" and that the first time the City enacted distance requirements between adult businesses and protected land uses, it could have chosen whatever distances it deemed appropriate, so long as those distances allowed sufficient alternative sites for the businesses to operate. Sum. Jmt. Opinion, at 811-12. However, the Court also held that, after the City has enacted such distance requirements and invited reliance by businesses as to where they may engage in protected First Amendment activity, the City may not amend these distances without once again following the prerequisite constitutional test. This test requires that the City justify the need for amendments by reliance on evidence that could reasonably be believed to show that those amendments could decrease negative secondary effects – other than by simply putting the protected entities out of business. *See id.* at 101 ("although 'reform may take one step at a time,' the City must adduce some justification tied to secondary effects for each step it takes") (quoting *Hang On, Inc. v. City of Arlington,* 65 F.3d 1248, 1256 (5th Cir.1995)).

Even if the City's evidence was sufficient to show that sexually oriented businesses continue to exert negative secondary effects on surrounding areas, nothing in the legislative record provides any indication that effects occur up to 1,500 feet away from the businesses or that negative effects could be reduced by requiring adult businesses to

be located at least 1,500 feet away from protected land uses, as opposed to 750 or 1,000 feet away.[33]

5. Legislative Reliance on Other Agencies and Staff

Finally, the City argues that the Court failed to follow the Fifth Circuit's holding in *Lakeland Lounge,* that, in order to demonstrate content-neutral intent, the City may show that City Council members relied upon others to review studies of negative secondary effects. As discussed above, the Court searched the minutes and transcripts of all the City Council meetings, as well as all other evidence in the legislative record, and has failed to find evidence that *anyone* involved in the legislative process actually considered evidence from Houston's prior legislative records, or actual studies from other cities (as opposed to brief summaries of other cities' ordinances), in the process of formulating the Ordinance's new distance requirements. *See* Sum. Jmt. Opinion, at 803 n. 102.

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[33] In the Summary Judgment Opinion, the Court held in the alternative that, even if it should analyze the Ordinance's increased distance requirements as content-neutral amendments, they were nevertheless unconstitutional because the City has failed to show that they serve substantial governmental interests. *See* Sum. Jmt. Opinion, at 813-14. The Court also now holds, in the further alternative, that the increased distance requirements are invalid because the City has failed to show that they are sufficiently "narrowly tailored." If the problem the City sought to address was the negative secondary effects produced by the location of sexually oriented businesses near protected land uses, the City, through its legislative record, failed to show why the previous distance requirements were not sufficient to address those effects and thus failed to show that the new increased requirements were narrowly tailored to address the problem.

The City cites portions of the record that it claims provide evidence that the City Attorney's Office, the Vice Division, and the Planning Department guided City Council members in their enactment of the new distance requirements. *See* Motion for Reconsideration, at 9 (citing Exhibits 2C, 3D, and 36 to City's Motion for Summary Judgment [Doc. # 120]). The Court does not doubt that City Council members received guidance on many subjects from these sources. However, the City still has not cited, nor has this Court found, any evidence that the City Attorney's Office, the Vice Division, the Planning Department, or the City Council or its staff considered studies, testimony, or evidence that negative secondary effects exist between 750 and 1,500 feet away from adult businesses or that the original distance requirements are otherwise not large enough to address the businesses' impact on nearby protected land uses.

The City also cites portions of the record that it claims provide evidence that City Council members themselves considered summarized reports of studies of secondary effects. *See* Motion for Reconsideration, at 9-10 (citing Exhibit 1 to City's Motion for Summary Judgment [Doc. # 120]; Exhibit 2C, at 21; Exhibit 35, at 5). The Court has reviewed these portions and finds no evidence from them that Council members reviewed such reports and has found no evidence on which Council members *could have* relied to justify increased distance requirements on the basis of alleviating identified negative secondary effects.

Thus, the Court concludes that there is no reason to alter its original finding that the increased distance requirements in Ordinance 97-75 are content-based, and that the City has failed to justify these amendments under the strict scrutiny test. The Court reaffirms its conclusion

that the 1,500 foot distance requirements are unconstitutional.

B. *Public Parks*

1. Content-Neutrality of Protected Use Status

The Dee & Dee Plaintiffs request that the Court reconsider its holding that the City's addition of public parks to the list of protected land uses was a content-neutral amendment to its sexually oriented business ordinance. *See* Dee & Dee Plaintiffs' Corrected Motion for Reconsideration [Doc. # 376], at 11-14. Plaintiffs argue that the legislative record does not contain any actual evidence of negative secondary effects which this amendment could have been enacted to eliminate.

The Court specifically addressed this argument in its Summary Judgment Opinion. There it explained that:

> [The] legislative evidence in support of adding public parks to the list of protected land uses [is] exceedingly slim, but it is sufficiently specific to render this amendment to the Ordinance content-neutral. . . . [S]ince negative secondary effects of some sort have been generally shown over the years to exist in areas immediately surrounding sexually oriented businesses . . . this new testimony and discussion regarding public parks is sufficient – although only marginally – to justify the City's addition of this category of protected land uses to the Ordinance's locational restrictions. . . . [A] City Council member could have reasonably relied upon the combination of previously adduced evidence and the Committee's new discussion of the issue to conclude that

> the City had the same interest in protecting public parks that it had in protecting schools, churches, daycare centers, and residential areas. . . . Thus, the Committee specifically considered why the previous list of protected land uses was not sufficient to alleviate problems the Ordinance was intended to address.

Sum. Jmt. Opinion, at 814-15 & n. 124.

Plaintiffs have failed to persuade the Court that this reasoning was in error. The Supreme Court held in *City of Renton* that evidence that is "reasonably believed to be relevant to the problem that the City addresses," 475 U.S. at 51-52, 106 S.Ct. 925, will be adequate to support a new restriction on adult businesses. The Houston City Council's conclusion that the use of parks by children and families is comparable to use by churches, schools, and daycare centers, which typically contain playgrounds and are sites for activities for children, is a reasonable conclusion drawn from the Ordinance's current and historical legislative records. Therefore, the Court rejects the Plaintiffs' challenge to reconsider its conclusion that the City's addition of public parks to its list of protected land uses is content-neutral.

2. Alternative Avenues of Communication

In its Summary Judgment Opinion, the Court concluded, not only that the City's addition of public parks to the list of protected land uses is content-neutral and narrowly tailored to serve substantial governmental interests, but the Court also reached the conclusion that Plaintiffs had not raised any material issue of genuine fact with respect to whether the addition of public parks to the list would reduce the number of available sites for adult

businesses so much as to be unconstitutional. The Court reached its conclusion that, even with this new restriction, there would still be a sufficient number of alternative sites for adult businesses based on an estimate from the City's Planning Department that adding parks to the list would eliminate only 1,000 out of roughly 19,000 potential sites for sexually oriented businesses. *See* Sum. Jmt. Opinion, at 814-15 (citing Transcript of October 23, 1996, Committee Meeting, Exhibit 12D to City's Motion for Summary Judgment [Doc. # 120], at 15).

The Dee & Dee Plaintiffs argue that it was improper for the Court to rely on evidence from the legislative record to make this type of determination because the Court only accepted the exhibits making up the legislative record for the limited purpose of showing what evidence City Council members considered in passing Ordinance 97-75. The Court agreed that this evidence would mostly constitute inadmissible hearsay if offered to prove the truth of the matters asserted therein. *See* Sum. Jmt. Opinion, at 786-87.

On reconsideration, the Court concludes that the Dee & Dee Plaintiffs are correct that the Court should not have relied on this evidence for proof regarding the ultimate factual issue of whether the addition of public parks leaves a sufficient number of sites for sexually oriented businesses. The Court finds that there is a genuine question of material fact on the number and adequacy of sites available under this amendment and holds that Plaintiffs should have the opportunity to rebut or impeach the City's proffered evidence before the Court uses it for this purpose.

The Court therefore grants the Dee & Dee Plaintiffs' Motion for Reconsideration on the issue of whether the addition of public parks to the Ordinance's list of protected land uses will allow a sufficient number of alternative sites for affected businesses to relocate.[34] The Court's order granting the City summary judgment on this issue is withdrawn, and the issue will be addressed in due course as necessary.[35]

C. *Multifamily Dwellings*

1. Content-Neutrality of Revised Formula

The FTU Plaintiffs contend that, for the same reasons that the Court decided that the Ordinance's new distance requirements are invalid content-based restrictions, the Court should conclude that the Ordinance's new formula for calculating residential areas, which gives greater weight to multifamily dwellings, is also an invalid amendment. *See* FTU Plaintiffs' Motion for Reconsideration [Doc. # 381], at 12-15. Specifically, these Plaintiffs argue that the Ordinance's legislative history contains no

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[34] The Dee & Dee Plaintiffs claim that the Court cited documents in the legislative record for the truth of the matter asserted not only with respect to public parks and alternative sites but also "at several points in the opinion." Dee & Dee Plaintiffs' Corrected Motion for Reconsideration [Doc. # 376], at 7. However, Plaintiffs do not specify where else in the Opinion they believe the Court made this error. Therefore, in all other respects, this argument is rejected.

[35] Plaintiffs have not submitted their own summary judgment evidence to show that the Ordinance's addition of public parks to the list of protected land uses will not provide a sufficient number of alternative sites for adult businesses. The Court nevertheless reverses its grant of summary judgment for the City on this issue because Plaintiffs have not yet had the opportunity to conduct discovery on the issue of alternative sites. *See* instructions to parties *infra* at 46.

evidence that the Ordinance's previous method of determining whether an area is 75% residential was inadequate to address any negative secondary effects caused by adult businesses.

The Court has found that, as with the City's addition of public parks to the list of protected land uses, City Council members enacted the new multifamily formula based on sparse but adequate evidence. The Court held that this enactment was content-neutral because Committee discussions demonstrated that Council members considered, on the merits, City officials' concerns about the previous formula's inadequacy and lack of logic with respect to residential areas with multifamily dwellings. *See* Sum. Jmt. Opinion, at 815-816. An examination of those discussions reveals that the new multifamily dwelling formula was designed, not to be a substantial expansion of the previous Ordinance's restrictions, but instead to be a mere clarification of the previous method of determining whether an area is residential.

For instance, at one Committee meeting, Council members were informed that, by treating each multifamily dwelling as one tract – the same as a single family dwelling – in the calculation of whether an area is at least 75% residential, the previous version of the Ordinance actually gave less weight per acre to multifamily dwellings than to single family dwellings. Joseph Chow, from the City Planning Department, explained to the Committee that the standard single family lot in the City is one-eighth of an acre. *See* Transcript for November 20, 1996, Committee Meeting, Exhibit 15C to City's Motion for Summary Judgment [Doc. # 120], at 32-33. Therefore, according to this testimony, by requiring that multifamily dwellings be counted to comprise eight residential tracts per acre,

rather than a single tract regardless of its size, the new formula, rather than significantly expanding the impact of residential areas on permissible locations for adult businesses, simply treats multifamily and single family dwellings more equally than before. *See id.* at 33 (Co-Chair Boney stated that counting eight tracts per acre is "counting apartments as they would correlate most naturally to a single-family home . . . in terms of area").

Although Plaintiffs contend that some of them will be affected by the new multifamily dwelling formula, it does not appear that this amendment will have the same far-reaching effect that the new 1,500 foot distance requirements would have had on the adult business industry as a whole. In fact, the parties' recent submissions establish that it is not clear exactly how the new formula will affect adult businesses located near multifamily dwellings. This uncertainty supports the Court's conclusion that the City Council enacted this amendment for the purpose of closing a perceived loophole in the prior version of the Ordinance, rather than for the purpose of adopting an intentionally more stringent restriction in order to force as many adult businesses to close or relocate as possible. The Court again concludes that the multifamily provision of the Ordinance was based on reasonable inferences from evidence before the Sexually Oriented Business Committee that a correction was necessary to conform the Ordinance to the realities of what constitutes a primarily residential area in the City of Houston.

The Court therefore reaffirms its holding that the new multifamily dwelling formula is not a content-based amendment to the Ordinance. This amendment is therefore valid so long as its implementation is shown, under the relevant constitutional standards, to allow a sufficient

number of alternative sites on which affected adult businesses may operate.[36]

2. Alternative Avenues of Communication

Although the Court held in its Summary Judgment Opinion that the Ordinance's new formula for multifamily dwellings is content-neutral and is sufficiently tailored to serve substantial governmental interests, the Court was unable to rule on the constitutionality of the new formula because there was no evidence in the record from which the Court could determine whether the formula satisfied the final element of the First Amendment intermediate scrutiny test. Specifically, the record contained no evidence regarding whether implementation of the formula, isolated from the invalidated increased distance requirements, would allow sufficient alternative avenues of communication for affected adult businesses. *See* Sum. Jmt. Opinion, at 816-17.

The Court directed the parties to submit legal memoranda and affidavits describing what impact the new formula would have on adult businesses in Houston. The Court specifically directed the parties to indicate "what factual evidence currently exists regarding the potential impact of this provision and, if this evidence is now lacking, what measures would need to be taken to produce

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[36] In the alternative, the FTU Plaintiffs request that the Court declare the new multifamily dwelling formula invalid at least with respect to preexisting lawful businesses. For the reasons described *infra* in Section III.D.1., the Court rejects Plaintiffs' argument that the City cannot validly change the rules for adult businesses that previously established themselves in locations that conformed to the previous version of the Ordinance.

such evidence." *Id.* at 113. The purpose of this request was so that the Court could ascertain whether the issue of alternative sites with respect to the new multifamily dwelling formula could be determined promptly through the summary judgment process, without the need for further discovery. After examining the parties' submissions in response to the Court's request, the Court has concluded that material factual uncertainties preclude resolution of this issue through summary judgment at this time.

According to the City, as many as 41 adult businesses may have been denied licenses under Ordinance 97-75 based at least in part on the new multifamily dwelling formula.[37] The Court recognizes that there are various

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[37] Originally, the City responded to the Court's request by indicating that only three businesses were denied licenses under Ordinance 97-75 "solely" on the basis of the multifamily dwelling formula. *See* City's Memorandum of Law in Support of Alternative Avenues of Communication Regarding Multi-Family Dwelling Formula [Doc. # 354], at 2, and attached Affidavit of Robert F. Foulis, ¶ 5. However, in response to objections submitted by various Plaintiffs, the Court directed the City to report to the Court "the identities of the Plaintiffs whose applications were denied, *in whole or in part*, as a result of the multifamily dwelling provision." Order [Doc. # 372] (emphasis added). The Court noted in another Order that the number of businesses denied licenses "solely" on the basis of the multifamily dwelling formula was not a useful figure because those businesses whose licenses had been denied based on *both* the multifamily dwelling formula *and* one of the increased distance requirements might now be materially affected by the multifamily dwelling formula in light of the Court's invalidation of the Ordinance's increased distance requirements. *See* Order [Doc. # 362], at 2 n. 1.

In response to the Court's Second Order on this issue [Doc. # 372], the City submitted a letter, dated March 30, 1998, which lists 37 Plaintiffs that were denied licenses under Ordinance 97-75 based at least in part on their proximity to residential areas and for whom the residential density calculation included application of the new multifamily dwelling formula. In response to letters submitted by the Chil

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reasons why this number may not be accurate.[38] The Court also recognizes that this number was derived from an analysis of those businesses that were deemed nonconforming under the 1,500 foot residential distance requirement rather than the previous 1,000 foot requirement, even though the Court invalidated the 1,500 foot requirement as unconstitutional.[39] At a minimum, the City's data on the impact of the multifamily formula is uncertain. However, if the City's own figure is nevertheless accepted, the Court finds that the formula's potential effect on 41 adult businesses out of 114 adult businesses operating in

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Soung and N.W. Enterprises Plaintiffs noting errors on this list, the City later added four additional Plaintiffs, bringing the total number to 41. *See* Letter from the City to the Court, dated April 9, 1998.

[38] Most importantly, as the City admits, it is not clear from the evidence of record whether these businesses were denied licenses *because of* the multifamily dwelling formula or whether, instead, they are included on the list simply because the multifamily dwelling formula was used in calculating whether they violated the new residential proximity restriction. In other words, it is not clear whether these businesses, which were apparently licensed under the previous version of the Ordinance, became nonconforming because of the addition of the multifamily dwelling formula, the extension of the residential distance requirement from 1,000 feet to 1,500 feet, or a combination of both.

[39] Plaintiffs have raised vociferous objections to the fact that the City submitted information regarding application of the multifamily dwelling formula using the invalidated 1,500 foot distance requirement, rather than the 1,000 foot requirement contained in the previous version of the Ordinance. In its Orders of March 13, 1998 [Doc. # 362], and March 17, 1998 [Doc. # 372], the Court specifically directed the City to provide information with respect to the 1,500 foot distance requirement because that information was the only data readily available, and the City stated that comparable information using the 1,000 foot distance requirement will take at least several months to compile.

Houston[40] is substantial enough to indicate a need for further, more definitive factual development on the issue of how many sites actually would be available if the new multifamily dwelling formula were to be enforced.[41]

The actual number of Plaintiffs affected by the formula remains a material factual question also because it is impossible to determine from the current record how many sexually oriented businesses would be affected if the multifamily dwelling formula were applied using the 1,000 foot residential distance requirement, rather than the 1,500 foot requirement. As the Dee & Dee Plaintiffs point out, some businesses may be affected by the formula under the 1,000 foot requirement, even if they were not affected by the formula under the 1,500 foot requirement, because a calculation based on a 1,500 foot radius might include enough non-residential tracts (outside of the 1,000 foot radius) to dilute the effect of residential tracts (including multifamily dwellings) located within the 1,000 foot radius. *See* Dee & Dee Plaintiffs' Memorandum of Law Regarding the Impact of the Multi-Family Dwelling Formula and Incorporated Motion for Partial Summary Judgment [Doc. # 377], at 3.

More importantly, however, the relevant constitutional inquiry is not how many Plaintiffs would be affected

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[40] According to Vice Officer Robert F. Foulis, the Vice Division received and investigated applications from 114 adult businesses under Ordinance 97-75. *See* Affidavit of Robert F. Foulis, Attachment to City's Memorandum of Law in Support of Alternative Avenues of Communication Regarding Multi-Family Dwelling Formula [Doc. # 354], ¶ 4.

[41] The City claims that only a "negligible" number of Plaintiffs were affected by the formula. The Court disagrees. Forty-one potentially affected businesses out of 114 adult businesses that sought licenses under Ordinance 97-75 is not a "negligible" number.

by the new multifamily dwelling formula but is instead how many alternative sites would be available for those Plaintiffs that would be forced to relocate. The number of alternative sites that might be available under the new formula as applied either to the 1,000 foot radius or to 1,500 foot radius remains an entirely unresolved issue on this record.

The City has submitted evidence purporting to establish that, even under the full locational restrictions of Ordinance 97-75, including the invalidated distance requirements, there are at least 183 sites legally available in the City to which affected businesses could relocate. *See* Affidavit of Vice Officer Steve Andrews, Attachment to City's Reply to FTU Plaintiffs' Response to Summary Judgment on Location Issue [Doc. # 244].[42] However, prior to the Court's Summary Judgment ruling, Plaintiffs raised numerous not insubstantial objections to the City's methodology for calculating this figure and urged the Court to allow them opportunity for discovery so that they could challenge the City's proffer. Given the widely disparate estimates of the number of alternative sites that the City itself specified to the City Council (7,597) and to this Court (183), even before taking into account the Plaintiffs' potential factual challenges to these figures, the Court concludes there remains a material question of fact as to these matters. In order to rule on the constitutionality of the multifamily dwelling formula, it is therefore necessary

[42] This estimate takes into account the spacing requirement of § 28-125(b)(2) of Ordinance 97-75, which the Court noted in its Summary Judgment Opinion would have to be considered in connection with any meaningful analysis of what alternative sites would be available. *See* Sum.Jmt. Opinion, at 813 n. 121.

for the Court first to receive evidence regarding the number of sites that would be available if this formula were implemented.[43]

For these reasons, the Court concludes that there remain genuine questions of material fact regarding how many adult businesses would be affected by the multifamily dwelling formula when implemented in conjunction with the 1,000 foot residential distance requirement and whether there would be a sufficient number of alternate sites available for these affected businesses. All parties' requests for summary judgment on the validity of the multifamily dwelling formula are therefore denied at this time.[44]

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[43] In support of its argument that there would be a sufficient number of sites available under the 1,000 foot residential distance requirement using the new multifamily dwelling formula, the City notes that in *4330 Richmond Ave., et al. v. City of Houston*, No. 91-0665 (S.D.Tex. July 11, 1997), Judge Rainey found there were sufficient sites based on the 1,000 foot requirement of the prior ordinance. *See* City's Memorandum of Law in Support of Alternative Avenues of Communication Regarding Multi-Family Dwelling Formula [Doc. # 354], at 4. However, as the City itself admits, this finding is inapplicable to the issue presented here, since there was no multifamily dwelling formula in the prior ordinance. *See id.*, at 4 n. 2.

[44] The Dee & Dee Plaintiffs have recently moved for summary judgment invalidating the multifamily dwelling formula on the ground that the City's responses to the Court on this issue did not satisfy its burden of production with respect to the alternative avenues prong of the constitutional analysis. *See* Plaintiffs' Memorandum of Law Regarding the Impact of the Multi-Family Dwelling Formula and Incorporated Motion for Partial Summary Judgment [Doc. # 377], at 2, 7. *See also* Dee & Dee Plaintiffs' Objection to N.W. Enterprises, Inc., Memorandum of Law Regarding Multi-Family Dwelling Formula [Doc. # 378] (contending that City should not be given additional time to satisfy its burden of production and that Plaintiffs are entitled to summary judgment immediately on this issue). The Court rejects the

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The parties are directed to submit a joint proposal (no more than five pages in length) on or before June 22, 1998, for a discovery schedule and trial procedures on the issue of alternative sites under the Ordinance's amendments regarding multifamily dwellings and public parks. The parties should follow (where applicable) the format for a Joint Discovery/Case Management Plan used in this district pursuant to Fed.R.Civ.P. 16 and 26(f). In this submission, the parties also shall state whether they seek to litigate this issue prior to completion of their appeals on the other locational issues.

D. *Plaintiffs' Global Challenges to Locational Restrictions*

Even though Plaintiffs were primarily successful in their challenge to the Ordinance's new locational restrictions on adult businesses, a number of Plaintiffs continue to press arguments in their Motions for Reconsideration attacking the validity of these restrictions in general. Since not all of the new locational restrictions have been invalidated, the Court will address these issues. The Court rejects the City's argument that Plaintiffs lack standing to assert these arguments.

Dee & Dee Plaintiffs' argument here and **OVERRULES** their objection to the N.W. Enterprises Plaintiffs' memorandum. This issue is clearly a factual one, and the City has apparently not responded with specifically relevant information because it will take some time to make the appropriate calculations.

1. "Shell Game" Argument

First, the FTU Plaintiffs urge the Court to rule on their "shell game" argument, which they claim that the Court did not address in its Summary Judgment Opinion. In this argument, the FTU Plaintiffs claim that the City has engaged in a long-term strategy of continually changing the rules with which adult businesses must comply in order to operate in Houston. Plaintiffs contend that the last time the City changed the rules governing where many adult businesses could be located, in 1986, most adult businesses in the City either had to close or change locations. Plaintiffs contend that now that the businesses have settled into a new set of rules and found new locations, and many new businesses have opened in reliance on the set of rules the City adopted, the City should not be allowed to change the rules *again* – and apply them retroactively – forcing the businesses that relied on the previous rules in selecting their current locations to move or close. Plaintiffs argue that no reasonable businessperson would continue to operate an adult business in Houston, knowing that the City could continually change the rules and force the owners to lose their substantial investments. Plaintiffs argue that if the City is permitted to engage in such a strategy, owners of adult businesses would be denied a reasonable opportunity to conduct their businesses and thus would effectively be denied the opportunity to engage in protected speech.

The Court spoke to this issue when it stated that the City "has the prerogative of experimenting with different possible solutions to municipal problems even when dealing with First Amendment interests." Sum.Jmt. Opinion, at 811 (citing *City of Renton,* 475 U.S. at 52, 106 S.Ct. 925). By this ruling, the Court rejected Plaintiffs'

argument that the Ordinance's new locational restrictions are invalid merely by virtue of the fact that the City altered the rules upon which adult businesses had relied. As described in the Summary Judgment Opinion, the City may change the restrictions as long as, each time it does so, it satisfies the requisite constitutional test.[45] Plaintiffs have cited no authority for the proposition that enacting a significant change of rules for adult businesses, even for a second time, in and of itself violates the First Amendment. The Court therefore rejects Plaintiffs' "shell game" argument.

2. Equal Protection

The FTU Plaintiffs also urge the Court to address their argument that the Ordinance's locational restrictions violate, not only the First Amendment, but also the Equal Protection Clause because virtually no other businesses in Houston are subjected to the type of locational restrictions contained in Ordinance 97-75. However, Plaintiffs have not provided the Court with any legal authority in support of their contention that the City's alleged differential

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[45] The Court explained that its

> conclusion that the City has failed to show that the Ordinance's new distance requirements were enacted in a content-neutral manner is not a *per se* ruling that the City cannot revise its previously enacted distance requirements. The City could have validly increased the distances if it had first, in some way, tied these increases to evidence in the legislative record demonstrating that, or at least supported them with some rationale as to why, the earlier distance requirements did not adequately address the negative secondary effects previously found to exist.

Sum.Jmt. Opinion, at 813.

treatment of them, compared to other types of businesses, violates the Equal Protection Clause.

The Court is not persuaded that Plaintiffs have a claim under the Equal Protection Clause. In sum, Plaintiffs are incorrect in their assertion that the Equal Protection Clause requires that they be treated "no differently (or at least no worse) than other similarly situated businesses." FTU Plaintiffs' Reply in Support of their Motion for Reconsideration [Doc. # 429], at 15. Because adult businesses are not a protected class, they are not entitled to any heightened equal protection scrutiny. Thus, the City need only prove, under the rational basis test, that it has some minimal justification for treating adult businesses differently from other businesses. Plaintiffs have a heavy burden to prove that the City's treatment of them is invalid under the very low threshold of the rational basis test. *See* Sum.Jmt. Opinion, at 773-74 (citing *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 441-42, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 7-8, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974); *SDJ*, 837 F.2d at 1273). Plaintiffs have not persuaded the Court that they have any chance of succeeding on the merits of this test as a matter of law, as to any particular locational restriction or as to the Ordinance as a whole. Plaintiffs, moreover, have not cited any cases involving local regulation of sexually oriented businesses in which an equal protection argument was successful.

For these reasons, the Court rejects Plaintiffs' equal protection argument. The Court also denies Plaintiffs' repeated requests to obtain discovery on this issue. Such discovery is not relevant and is not likely to lead to discovery of admissible evidence under Fed.R.Civ.P. 26(b)(1).

3. "Spot Zoning"

In their Motion for Reconsideration [Doc. # 388], the Chil Soung Plaintiffs argue once again that Ordinance 97-75 is unconstitutional because it regulates land use even though Houston does not have a comprehensive zoning plan. It is not clear which aspects of the Ordinance the Chil Soung Plaintiffs specifically continue to challenge with this argument, given that the Court already ruled substantially in favor of the Plaintiffs on the locational restrictions, by striking down the Ordinance's new 1,500 foot distance requirements.

To the extent that the Chil Soung Plaintiffs attempt to press their challenge of "spot zoning" against the locational restrictions on which the Court has not ruled, *i.e.* the addition of public parks to the list of protected land uses and the new multifamily formula for calculating whether an area is residential,[46] the Court rejects this challenge. As cited in the Summary Judgment Opinion, the Texas Supreme Court specifically held in *City of Brookside Village v. Comeau,* 633 S.W.2d 790, 793 (Tex.1982), that cities can regulate land use under their general police powers without adopting comprehensive zoning plans. *See* Sum. Jmt. Opinion, at 798 n. 92. Moreover, in the Summary Judgment Opinion, the Court also undertook an extensive analysis of the question of whether the locational restrictions in Ordinance 97-75 constitute "zoning" and concluded that they do not. *See id.* at 62-70. In *SDJ,* the Fifth Circuit upheld a prior version of Ordinance

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[46] To the extent that Plaintiffs challenge locational restrictions contained in earlier versions of the Ordinance, that challenge is not properly before this Court. The present case involves only challenges to Ordinance 97-75.

97-75 notwithstanding the fact that it regulated locations of sexually oriented businesses in Houston even though the City did not have a comprehensive zoning plan. The Chil Soung Plaintiffs have failed to cite any new authority which could persuade the Court to reconsider the applicability of any of these prior holdings. The Chil Soung Plaintiffs' Motion for Reconsideration is therefore **DENIED**.

4. Protected Use Status for Schools, Churches, and Daycare Centers

In their Motion for Reconsideration, the Dee & Dee Plaintiffs challenge the Ordinance's designation of schools, churches, and daycare centers as protected land uses.[47] They argue that, even though the designation of these types of property as protected land uses was upheld by the courts in *SDJ* and *4330 Richmond,* they can nevertheless raise this issue anew because some of the Dee & Dee Plaintiffs were not parties to the previous litigation (and thus are not barred by claim preclusion) and because they raise arguments that were not made in the earlier cases (and thus are not barred by issue preclusion).

Specifically, the Dee & Dee Plaintiffs argue that: (1) the designation of churches as a type of protected land use violates the Establishment Clause; (2) the protected use

[47] The FTU Plaintiffs also challenge the designation of these protected land uses, but their challenge appears to address the validity of these designations only to the extent that "after-arriving" protected land uses could establish themselves near adult businesses and thereby disqualify preexisting adult businesses from their current locations. *See* FTU Plaintiffs' Motion for Reconsideration [Doc. # 381], at 23-25; FTU Plaintiffs' Reply in Support of their Motion for Reconsideration [Doc. # 429], at 16-20. The Court addresses the FTU Plaintiffs' argument regarding "after-arriving" protected land uses *infra* in Section III.E.

designation of schools, churches, and daycare centers is not actually supported in the legislative record by evidence of "dehumanizing effects" caused by sexually oriented businesses; and (3) even if the designation is so supported, "dehumanizing effects" are primary, not secondary, effects of sexually oriented businesses and therefore cannot serve as a valid basis for regulation.

The Court notes, first, that, to the extent that these arguments were raised in the earlier summary judgment briefing and addressed in the Court's Summary Judgment Opinion, the Court did not reject these arguments on the basis of claim or issue preclusion. The Court also does not hold now that any Plaintiffs who were not parties to previous litigation are barred from raising arguments on the basis of claim preclusion or are barred from raising previously unadjudicated issues on the basis of issue preclusion.

Instead, the Court rejects Plaintiffs' arguments regarding protected land uses on the merits. Although the Dee & Dee Plaintiffs raise some interesting arguments that the Ordinance's designation of churches as a protected land use violates the Establishment Clause, *see* Dee & Dee Plaintiffs' Corrected Motion for Reconsideration [Doc. # 376], at 16-18, these arguments are foreclosed by the Supreme Court's decision in *City of Renton,* 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29, which upheld a local ordinance that established minimum distance between sexually oriented businesses and churches.[48]

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[48] Despite Plaintiffs' contentions that more recent Establishment Clause cases have implicitly overturned this aspect of *City of Renton,* the Court will not diverge from the Supreme Court's acceptance in *City*

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In addition, the Court relies on *SDJ* for the conclusion that the City of Houston had adequate justification to designate schools, churches, and daycare centers as protected land uses. In *SDJ,* the Fifth Circuit affirmed the district court's conclusion that the City had adduced an adequate record of negative secondary effects to justify an earlier version of the Ordinance that included minimum distance requirements between sexually oriented businesses and these protected land uses. Thus, Plaintiffs are not barred by claim or issue preclusion from raising issues addressed by *SDJ* but rather are foreclosed by the holding in *SDJ,* which the Court considers to be binding legal precedent on the merits of Plaintiffs' arguments.

E. *New Issue Regarding "Grandfathering"*

Pursuant to § 28-125(c) of the Code of Ordinances, as it existed prior to and after the enactment of Ordinance 97-75, adult businesses in Houston are subject to locational restrictions based on the existence of protected land uses only at the time an adult business files an "original" application for a sexually oriented business license. Thus, under this provision, if a protected land use moves to a location nearby a licensed adult business, that adult business achieves what is known as "grandfathered" status with respect to that specific protected land use, and the proximity of that protected land use cannot prevent

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of Renton of the designation of churches as protected land uses in a sexually oriented business land use ordinance. Under *Agostini v. Felton,* 521 U.S. 203, 117 S.Ct. 1997, 2017, 138 L.Ed.2d 391 (1997), a lower court should not conclude that a legal precedent has been overturned by implication but instead "should follow the case which directly controls" until and unless that precedent is expressly overturned. *See* Sum.Jmt. Opinion, at 780.

the adult business from obtaining a renewal license, so long as its application is timely filed.[49]

According to the FTU Plaintiffs, the City has begun treating *all* applications for licenses under Ordinance 97-75 as "original" applications, simply on the basis of the fact that the City enacted a new Ordinance, even for adult businesses that were in business in their current locations prior to the passage of Ordinance 97-75. *See* FTU Plaintiffs' Motion for Reconsideration [Doc. # 381], at 16-22. Plaintiffs argue that, for preexisting businesses that were already licensed at the time of passage of Ordinance 97-75, these license applications should be treated as renewal applications, not original applications, so that preexisting adult businesses may retain their grandfathered status with respect to protected land uses that located themselves nearby after the adult businesses obtained their original licenses.

1. Plaintiffs' Standing to Raise this Challenge

In its Response, the City does not offer any substantive justification for its decision to label as "original" applications what are in reality renewal applications for

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[49] Section 28-125(c) provides as follows:

> Property uses and distances for original applications shall be determined as of the time that the application is filed. If a renewal application is timely filed as provided in section 28-124 of this Code, the property uses and measurements for the renewal application shall be determined as of the time that the original application for the enterprise was filed. If not timely filed, renewal applications shall be subject to the same fees and shall be treated in the same manner in all respects as original applications.

businesses that have been licensed under previous versions of the Ordinance and have been in operation in their existing locations, sometimes for many years. The City merely argues that Plaintiffs do not currently have standing to raise this challenge because this issue is not ripe. *See* City's Response to FTU Plaintiffs' Motion for Reconsideration [Doc. # 413], at 2-4. In support of this argument, the City posits a strained thesis: since the City intends to appeal the Court's invalidation of the Ordinance's new 1,500 foot requirements, any Plaintiffs who would be affected by these requirements only have a hypothetical possibility that they will be able to stay in their current locations anyway.

The Court rejects the City's argument that its intention to appeal this Court's rulings deprives Plaintiffs of standing to challenge this action. From this Court's perspective, based on its own rulings, Plaintiffs cannot be forced to move from their current locations simply on the basis of the invalidated distance requirements. The mere fact that this Court's rulings are subject to appellate review does not render the possibility that Plaintiffs might stay in their current locations merely a hypothetical possibility.[50]

In addition, various Plaintiff businesses have submitted evidence to show that the City has already denied

[50] Some of Plaintiffs' arguments may well be rendered moot if this Court's invalidation of the Ordinance's increased distance requirements is reversed, but from the standpoint of this Court, this issue has been resolved in Plaintiffs' favor. Moreover, although this Court's rulings are subject to appeal, it is the duty of this Court to resolve the justiciable issues presented to it at this time as fully as possible, so that the parties will not have to pursue unnecessary multiple appeals.

their permit applications under Ordinance 97-75 in part due to after-arriving protected land uses. *See* FTU Plaintiffs' Reply in Support of their Motion for Reconsideration [Doc. # 429], at 2. Thus, they have shown the necessary individualized and personal stake in the outcome of this issue to achieve standing.[51]

Moreover, although the City has agreed not to enforce the Ordinance's *new* locational requirements pending appeal of this case, *see* City's Response [Doc. # 413], at 4, that assurance does not address Plaintiffs' concern that the City will ignore their grandfathered status with respect to the locational requirements in the Code of Ordinances in effect prior to enactment of Ordinance 97-75. In other words, Plaintiffs fear that, even if the 1,500 foot distance requirements between adult businesses and protected land uses is not enforced, the City may nevertheless allow after-arriving protected land uses that located themselves within 750 feet of preexisting businesses to disqualify those businesses from obtaining licenses.

2. Analysis on the Merits

After the passage of Ordinance 97-75, all adult businesses were required to apply for new licenses because § 8(a) of the Ordinance renders previous licenses void.[52] It

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[51] The City also argues that the issue is not ripe because the Court has not yet ruled on the constitutional validity of the new multifamily dwelling formula. *See* City's Response to FTU Plaintiffs' Motion for Reconsideration [Doc. # 413], at 1-4. However, the City's treatment of their license applications as "original" applications does not appear relevant to the issue of the new multifamily dwelling formula.

[52] Section 8(a) simply provides that "[a]ll permits issued under Article III of Chapter 28 of the Code of Ordinances prior to the date of

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appears that the City has interpreted this fact to mean that applications for new licenses under Ordinance 97-75 may be treated as "original" applications because they are the businesses' first licenses applications under the new Ordinance.

However, nothing in § 8(a), nor any other provision of Ordinance 97-75, indicates that licenses obtained under the Ordinance by preexisting businesses shall be deemed to be "original" licenses – for the purposes of § 28-125(c) – rather than "renewal" licenses. On the contrary, another sentence in § 8(a) of the Ordinance indicates that the voiding of licenses obtained under previous versions of the Ordinance was intended merely to ensure that adult businesses would comply with the *new* restrictions contained in Ordinance 97-75; nothing suggests that the voiding of any existing businesses' licenses was intended to impose retroactively other changes to § 28-125(c) restricting the previous legislative scheme in the absence of the new provision in Ordinance 97-75. In particular, the third sentence of § 8(a) of the Ordinance states that:

> The purpose of this section is to provide for the orderly implementation of *this Ordinance* insofar as the amendments to Article III of Chapter 28 of the Code of Ordinances adopted in Section 3 of this Ordinance institute *new* requirements for enterprises permitted prior to the date of passage and approval of such amendments.

Ordinance 97-75, § 8(a) (emphasis added). Thus, the Court agrees with Plaintiffs that the City has no basis for

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passage and approval of this Ordinance shall become void on the effective date."

designating all license applications under Ordinance 97-75, submitted by preexisting, previously licensed, adult businesses, as "original" applications, rather than "renewal" applications for the purpose of § 28-125(c) in the absence of implementation of the new locational requirements of Ordinance 97-75.

Because the City's elimination of grandfathered status for existing businesses is not authorized by the Ordinance, City Council members could not have had any "intent" regarding this action. Thus, the Court cannot apply the *City of Renton* legislative content-neutrality analysis to this action by the City. Instead, the Court enjoins this action by the City on the simple ground that it is not provided for by the Ordinance. The City cannot administratively expand the reach of the Ordinance's locational restrictions beyond their own terms.

Furthermore, the City's unilateral decision to take this action is not only unsupported by the language of the Ordinance, but is also unsupported by the legislative record. The City has not cited, and this Court has not found, any discussion in the legislative record for Ordinance 97-75 by City Council members indicating an intent to eliminate the grandfathered status provided by § 28-125(c) for adult businesses with respect to the locational restrictions contained in the previous versions of the Ordinance, or evidence demonstrating a need to treat all license applications from preexisting businesses as "original" applications under Ordinance 97-75.[53]

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[53] The City Council's Sexually Oriented Business Committee engaged in extensive discussion regarding whether to provide grandfathered status for existing adult businesses that do not conform to the

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For these reasons, the Court holds that the City may not at this time reject a timely filed application for an adult business license under Ordinance 97-75 on the sole ground that the applicant is located within 750 feet of a school, church, or daycare center that arrived after the establishment of the adult business at that location.[54] Because the Court has reached this conclusion, it need not

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new Ordinance or whether instead to provide amortization. The Committee chose amortization. *See* Transcript for November 20, 1996, Committee Meeting, Exhibit 15C to City's Motion for Summary Judgment [Doc. # 120], at 42-48, 64-67. However, the City has not cited, nor has the Court found, any portion of the legislative record indicating – in the absence of implementation of the new locational restrictions in the 1997 amendments – that the Committee considered eliminating the grandfathered status provided by § 28-125(c) as to adult businesses that were in compliance with the earlier version of the Ordinance at the time they first opened, but as to which after-arriving protected land uses later moved within 750 feet.

[54] If the Court ultimately upholds the addition of public parks to the list of protected land uses, then the City could reject a license application submitted by an adult business that is located within 750 feet of a public park that arrived after the establishment of the adult business. Likewise, if the Court ultimately upholds the new multifamily dwelling formula, then the City could reject a license application submitted by an adult business that is located in an area that is 75% residential, as measured by a 1,000 foot radius and using the new multifamily dwelling formula, even if one or more multifamily dwellings moved within 1,000 feet of the adult business after the adult business was first established. This is because these restrictions are clearly included in the 1997 amendments to the Ordinance, and the City may enact retroactive locational restrictions on adult businesses so long as those new restrictions satisfy the requisite First Amendment test. *See supra* Section III.D.1. In contrast, as described in the text, the elimination of grandfathered status with respect to the pre-1997 Ordinance's locational restrictions is not included in Ordinance 97-75.

address several of Plaintiffs' related alternative arguments.[55]

F. *Maintenance of Status Quo Pending Licensing Application Process and Administrative and Judicial Review of License Denials*

The FTU Plaintiffs argue that the Ordinance's license requirement for adult businesses is invalid because, as applied in the current procedural posture of this case, it fails to guarantee a stay of enforcement during the licensing application process and during administrative or judicial review of a license denial. *See* FTU Plaintiffs' Motion for Reconsideration [Doc. # 381], at 49-54. The Court rejects this argument.

Under *TK's Video v. Denton County, Texas,* 24 F.3d 705, 708 (5th Cir.1994), before enforcing a licensing requirement against adult businesses that were already in existence at the time the licensing requirement went into effect, a municipality must, under the terms of the licensing ordinance, maintain the *status quo* by refraining from enforcing the licensing requirement during the administrative review period and during a "brief period" of time in which those businesses can obtain judicial review of any license denials. *See TK's Video,* 24 F.3d at 709. The City

[55] In their Motion, Plaintiffs argue that disqualifying adult businesses from locations near after-arriving protected land uses would be constitutionally invalid under the First Amendment, as well as the Establishment and Equal Protection Clauses. *See* FTU Plaintiffs' Motion for Reconsideration [Doc. # 381], at 23-25. However, Plaintiffs concede that the Court need not address these arguments if it grants their request for an order prohibiting the City from eliminating grandfathered status for adult businesses with respect to after-arriving protected land uses.

argues that this stay-of-enforcement requirement is satisfied by § 8(a) of the Ordinance, which provided an initial 180-day delay after the Ordinance's passage during which the Ordinance's new locational provisions would not be enforced and thus allowed Plaintiff businesses, and all preexisting adult businesses, the opportunity to pursue administrative and judicial review of their license denials and of the Ordinance itself.

Plaintiffs argue that the initial 180-day delay does not satisfy the *TK's Video* stay-of-enforcement requirement because of the current procedural posture of this case. Specifically, Plaintiffs contend that, since the Court invalidated the Ordinance's new locational restrictions in part, that portion of the Ordinance was unconstitutional – and thus effectively did not legally exist – at the time the Ordinance was enacted and during the entire initial 180-day period delay of enforcement for the locational restrictions. According to Plaintiffs, if the Ordinance's locational restrictions are ultimately upheld in part and struck down in part, then the locational restrictions in the Ordinance that are ultimately ruled to be valid will not legally come into existence until the completion of this lawsuit. At that point, Plaintiffs contend, they would be entitled to a stay of enforcement for a brief period during which they may seek administrative and judicial review of any license denials under the terms of the Ordinance that are ultimately upheld. Because the Ordinance itself does not provide for such a stay, Plaintiffs argue that the Ordinance

is constitutionally invalid under the holding of *TK's Video.*[56]

[56] Plaintiffs contend that the Ordinance does provide the required stay for applicants whose licenses have been suspended or revoked but that it does not provide a stay for original license applicants. *See* FTU Plaintiffs' Motion for Reconsideration [Doc. # 381], at 50. (In support of this contention, Plaintiffs cite the Ordinance at § 28-257, the section which relates to individual entertainer and manager permits. It appears, however, that they intended to refer to the Ordinance at § 28-135(c), the section which applies to enterprise permits.) Plaintiffs claim that the Ordinance's stay provision is therefore insufficient because the City has been treating *all* applications for licenses under Ordinance 97-75 as "original" license applications, even for sexually oriented businesses that were in operation before Ordinance 97-75 was enacted. In light of the Court's ruling in the previous section that the City may not treat license applications from preexisting businesses as "original" applications, it is possible that § 28-135(c) provides the stay to which Plaintiffs insist that they are entitled. Arguably, the language of § 28-135(c) supports the conclusion that preexisting businesses whose license applications under Ordinance 97-75 have been denied are in a position comparable to licensed businesses whose permits have been suspended or revoked and which thus are entitled to the stay provided by this section. The final sentence of this section states that:

> This subsection shall apply only to a decision sustaining the suspension or revocation of a permit for an existing enterprise, and shall not apply to a decision sustaining the denial of an *initial* application for a *proposed* enterprise.

§ 28-135(c) (emphasis added). Since denial of a renewal application from a preexisting business for a license under Ordinance 97-75 cannot be considered to be an "initial" application for a "proposed" enterprise, the language could be said to imply that a denial of a renewal application would instead be considered in the only other available category, a "suspension or revocation of a permit for an existing enterprise." Thus, it is possible, under this interpretation, that the stay provision of § 28-135(c) applies to preexisting enterprises that have been denied licenses under Ordinance 97-75. However, no party has asserted this interpretation and it is somewhat strained. The Court therefore addresses Plaintiffs' argument on the merits above in the text.

The Court rejects Plaintiffs' contentions and holds that the initial 180-day delay provided by the Ordinance satisfies the *TK's Video* limited stay-of-enforcement requirement. In *TK's Video,* the Fifth Circuit found that a thirty-day period was a sufficient amount of time for unsuccessful license applicants to pursue judicial remedies. Nothing in *TK's Video* supports Plaintiffs' novel argument that the City was required to build into its Ordinance additional periods of delay contingent on various possible judicial rulings regarding the Ordinance's validity.[57]

Thus, the 180-day period provided by § 8(a) is sufficient for constitutional purposes.[58]

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[57] Plaintiffs also argue that the initial 180-day delay cannot count toward the stay period required by *TK's Video* because the City must have known that implementation of the Ordinance would be delayed due to lengthy constitutional challenges in court. In other words, Plaintiffs appear to contend that, because the City should have known that, due to litigation delays, no legally binding license denial would occur until well beyond the initial 180-day period, the City should have understood that, as a practical matter, adult businesses would not have the required period of time after those denials in which to raise challenges to those denials on individual grounds in state court, as opposed to the broader types of constitutional grounds raised in this lawsuit. However, it is this Court's understanding that many, if not all, Plaintiff businesses have already pursued state court appeals of their license denials under Ordinance 97-75. Although those appeals may now be stayed pending the outcome of this federal lawsuit, all that is required by *TK's Video* is that the businesses have the opportunity, before a license requirement is enforced, to *initiate* lawsuits challenging license denials. The City was not required to include a stay of enforcement until the completion of the judicial review process.

[58] *See infra* in Section VIII.A.2. for a discussion of the Court's revision of its ruling regarding the stay-of-enforcement requirement for entertainers and managers who are denied individual permits.

IV. *AMORTIZATION*

A. *Equal Protection Argument*

In their Motion for Reconsideration, the FTU Plaintiffs request that the Court reconsider its ruling that Plaintiffs do not have standing to argue that the Ordinance does not provide affected businesses with an adequate amount of time for amortization. *See* Sum. Jmt. Opinion, at 823. These Plaintiffs argue that 180 days, the amount of time provided by § 8 of the Ordinance, violates the Equal Protection Clause because virtually no other type of business in Houston that is subject to a similar type of land use restriction has such a short period of time in which to recoup its investment and conform to the restriction. *See* FTU Plaintiffs' Motion for Reconsideration [Doc. # 381], at 8-11.

As described in the Summary Judgment Opinion, it is not even clear, under *SDJ,* that the City must provide amortization at all to businesses affected by a regulation such as Ordinance 97-75 because such a regulation does not constitute a taking. *See* Sum.Jmt. Opinion, at 817-18 (citing *SDJ,* 837 F.2d at 1278).

In any event, in its Summary Judgment Opinion, the Court stated that Plaintiffs do not have standing to raise this challenge because all businesses that will be affected by the upheld provisions of Ordinance 97-75 already had a *de facto* amortization period of more than a year due to the City's agreement not to enforce the Ordinance pending the Court's rulings on the parties' summary judgment motions. *See* Sum.Jmt. Opinion, at 823.[59] Although Plaintiffs

[59] Plaintiffs are incorrect in their contention that the Court's ruling that they lack standing to raise this challenge to the Ordinance's

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concede that they have in fact had this year for amortization, they claim that one year is still too short a period and that no other types of businesses that have been subjected to new regulations in Houston have had to make do with just one year for amortization. They also claim that the City's agreement not to enforce the Ordinance pending the Court's rulings does not render moot their facial challenge to the adequacy of the amortization provided by the Ordinance.

The Court reaffirms its prior holding that the delay in enforcement of any locational provisions has deprived Plaintiffs of standing to raise this challenge. Because no Plaintiff businesses were held to the Ordinance's 180-day amortization period, any argument regarding the adequacy of such a period is merely academic. Moreover, the period during which a stay has been in effect, while this case has been in litigation before this Court, should clearly count toward the time the businesses have for *de facto* amortization.[60] The purpose of an amortization period is to allow affected businesses a period of time following new regulation during which they can earn revenue toward reimbursing owners for their investments. There is no need to wait until all legal issues are resolved to begin the

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amortization provision was based simply on an uncertainty as to whether any Plaintiffs would still be affected by the Ordinance's locational restrictions after the Court's partial invalidation of those restrictions. Instead, the Court held that Plaintiffs lacked standing because the litigation delay had effectively extended their amortization period beyond that provided by the Ordinance. *See* Sum.Jmt. Opinion, at 823.

[60] As a practical matter, an appeal in this case is inevitable. If enforcement of the Ordinance's locational restrictions are stayed during the appeal, neither the parties nor this Court have any idea how much time Plaintiffs may actually have for a *de facto* amortization period.

clock for amortization purposes. As soon as the City passed its new Ordinance, all owners of adult businesses in the City were on notice that the City intended to change the regulations applicable to their businesses. Since Plaintiffs elected to institute legal challenges to the Ordinance, they have received even more time to recoup their investment.

Two of the FTU Plaintiffs appear to claim that they will not receive sufficient time for amortization because imminent implementation of the new multifamily dwelling formula will soon force them to close or relocate. However, the Court remains unpersuaded that this issue is ripe or that these Plaintiffs have standing to challenge the adequacy of the Ordinance's amortization provisions, since the Court has not yet ruled on the validity of the multifamily dwelling formula and the City has indicated that it will continue the enforcement standstill until all the locational issues are resolved.

Even if Plaintiffs are correct that the issue is ripe and they have standing to challenge the Ordinance's amortization provisions under the Equal Protection Clause, the Court rejects this challenge. As discussed *supra* in Section III.D.2, given their heavy burden under the rational basis test, Plaintiffs have not persuaded the Court that they have any chance of succeeding on the merits of their Equal Protection challenge.[61]

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[61] In their original summary judgment briefing, the FTU Plaintiffs requested discovery on the issue of what other types of businesses are subject to land regulation by the City so that Plaintiffs could compare their treatment with that of these other types of businesses. The Court indicated that Plaintiffs could have obtained such information through channels other than discovery. *See* Sum.Jmt. Opinion, at 822-23. In their Motion for Reconsideration, the FTU Plaintiffs once again seek

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B. *Requests for Clarification*

The N.W. Enterprises Plaintiffs request clarification on several issues addressed by the Court in its Summary Judgment Opinion regarding the amortization provisions of the Ordinance. *See* N.W. Enterprises Plaintiffs' Motion for Reconsideration [Doc. # 343], at 10.

First, the N.W. Enterprises Plaintiffs ask whether the Court considers all amortization decisions moot except as to businesses located within 750 feet of a park, disqualified under the new multifamily dwelling formula, or non-protected businesses not covered by the First Amendment.[62] The City has not responded to this issue, and the Court declines to characterize conclusively the interim legal effect of its rulings on the amortization decisions. Although many of the amortization decisions may currently

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discovery on this issue, contending that such information is far more readily available to the City than to Plaintiffs. Again, the Court denies Plaintiffs' discovery request on this issue, since Plaintiffs have not persuaded the Court that their challenge to the Ordinance's amortization provision has any legal viability or that the information is unavailable to Plaintiffs from other sources.

[62] The Court notes that, despite its distinction between adult businesses that are protected by the First Amendment and those that are not, *see* Sum.Jmt. Opinion, at 780-82, the City has stated that it does not intend to draw this distinction in its enforcement of the Ordinance's locational restrictions. *See* City's Response to N.W. Enterprises Plaintiffs' Motion for Reconsideration [Doc. # 402], at 3. Thus, for purposes of this case, there is no reason to group businesses not covered by the First Amendment in the same category as the Ordinance's new provisions regarding public parks and multifamily dwellings. Also, as the City notes in its Response, the N.W. Enterprises Plaintiffs' argument that a modeling studio Plaintiff should be covered by the First Amendment, *see* N.W. Enterprises Plaintiffs' Motion for Reconsideration [Doc. # 343], at 9, is moot, since the City, for all practical purposes, is treating this Plaintiff as *if* it were covered by the First Amendment.

have no legal effect,[63] to the extent amortization is necessary under the Ordinance or the Constitution and Plaintiffs have participated in amortization hearings, the Court can conceive of no reason that the decisions from the amortization hearings would not be binding on Plaintiffs, should the Court's rulings be reversed by an appellate court.

Second, the N.W. Enterprises Plaintiffs ask whether the Court intends to allow discovery and development of expert witness testimony and trial on the adequacy and constitutionality of the amortization provisions as applied. The answer is no. As explained in the Summary Judgment Opinion, all of Plaintiffs' challenges to the Ordinance's amortization provisions fail as a matter of law because the Fifth Circuit held in *SDJ* that Houston's regulation of sexually oriented businesses cannot constitute a taking. *See* Sum.Jmt. Opinion, at 817-18 (citing *SDJ,* 837 F.2d at 1278). The Court nevertheless analyzed Plaintiffs' more detailed arguments with respect to amortization simply because the district courts in *SDJ* and *4330 Richmond* had done so and so that rulings will already have been made in this case in the event that the Fifth Circuit reconsiders its apparent decision in *SDJ* that no amortization provisions are even necessary in the City's sexually oriented business ordinance. *See* Sum.Jmt. Opinion, at 817-18.[64]

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[63] Because the City is enjoined from enforcing the 1,500 foot distance requirements between sexually oriented businesses and protected land uses and between sexually oriented businesses and residential areas, the amortization decisions that were made for the businesses that would have been forced to close or move due solely to these invalid provisions currently have no legal effect.

[64] Furthermore, to the extent that Plaintiffs are attempting to challenge the City's hearing officer's fact-based rulings on Plaintiffs'

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Third, the N.W. Enterprises Plaintiffs ask whether the Court intends to abstain from a case-by-case determination of the constitutionality of the amortization provisions as applied. For the reasons described in the preceding paragraph, the answer is yes.

Finally, the N.W. Enterprises Plaintiffs ask what timetable will apply for appeal of the administrative amortization decisions following the Court's Summary Judgment Opinion. Neither Plaintiffs nor the City has provided the Court with any guidance or suggestions as to the answer to this question. The issue is inadequately framed to permit an informed decision. The parties are expected to confer and try to reach some agreement on the matter.

V. *NOTICE PROVISION*

In their Motion for Reconsideration, the Dee & Dee Plaintiffs request that the Court reconsider its conclusion that the City acted in a content-neutral manner when it enacted a provision in the Ordinance, § 28-123(f), requiring owners of sexually oriented businesses to give notice to the community when such a business is about to open. *See* Sum.Jmt. Opinion, at 823-24; Dee & Dee Plaintiffs' Corrected Motion for Reconsideration [Doc. # 376], at 18-19. Plaintiffs argue that the legislative record does not contain any evidence supporting the City's argument that this provision furthers a substantial governmental interest.

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individual amortization claims, the Court deems these issues to be non-constitutional. Accordingly, they must be addressed in the administrative and state court appeals process set forth in the Ordinance and the Texas Government Code, not in this federal lawsuit.

Instead, Plaintiffs contend that the record demonstrates that the City Council enacted this provision simply in order to create one more obstacle that could limit the opening of sexually oriented businesses in the City. The Court rejects Plaintiffs' argument and reaffirms its previous ruling upholding the Ordinance's notice provision. In its Summary Judgment Opinion, the Court relied on *TK's Video,* 24 F.3d at 710, in which the Fifth Circuit upheld a similar notice provision. As the Court noted before, the Fifth Circuit in *TK's Video* squarely held that such notice requirements are not "disguised censorship. Rather, they are typical of notices routinely required in zoning regulations." *Id.*[65] The requirement of such notices is not content-based.

VI. *STRUCTURAL VISIBILITY, AND LIGHTING REQUIREMENTS*

A. *Adequacy of City's Justification*

In the Summary Judgment Opinion, the Court rejected Plaintiffs' facial challenges to the Ordinance's new structural, visibility, and lighting requirements. *See* Sum.Jmt. Opinion, Section V.E. In their Motion for Reconsideration, the Dee & Dee Plaintiffs have raised a creative new argument as to why the City Council could not have reasonably believed that these requirements would prevent

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[65] In addition, the Court notes that, according to the Legislative Report for Ordinance 97-75, City Council members received letters requesting that the public be notified when a sexually oriented business applies for an application. *See* Exhibit 36 to City's Motion for Summary Judgment [Doc. # 120], at 11-12 ("Suggestions ranged from 90 day notices by property signs to postcards being mailed to all residents in the area. Notification by newspaper, certified mail, and public hearings were also brought forth.").

the crime of public lewdness. *See* Dee & Dee Plaintiffs' Corrected Motion for Reconsideration [Doc. # 376], at 21-22. These Plaintiffs argue that these requirements will instead actually contribute to the prevalence of this crime. According to Plaintiffs, the crime of public lewdness, defined under Texas Penal Code § 21.07, cannot occur in a non-public place unless an actor is reckless about whether some person will observe her or his conduct who will be offended by such conduct. Therefore, Plaintiffs contend, the provisions of the Ordinance that enhance visibility inside sexually oriented businesses actually *create* the crime of public lewdness by making it more likely that actors engaging in lewd acts will be observed by others.

The Court rejects this argument. First, the legislative record establishes that public lewdness was not the only crime with which the City Council was concerned when it enacted the interior structural, visibility, and lighting requirements; it was also concerned about prostitution and the use or sale of narcotics. *See* Transcript of August 29, 1996, Committee Meeting, Exhibit 8E to City's Motion for Summary Judgment [Doc. # 120], at 94-95. Second, even if Plaintiffs' interpretation of the criminal statute is correct, Plaintiffs do not explain why the interior of sexually oriented businesses should qualify as non-public places. Furthermore, the City's substantial governmental interest in preventing the commission of lewd acts at sexually oriented businesses is not contingent on the issue of whether those acts, if not observed by others, would violate a specific state criminal statute. Finally, as the Court explained previously, Plaintiffs have offered no legal authority challenging the City's right to deny patrons of adult businesses any expectation of privacy while on the

premises of those businesses. *See* Sum.Jmt. Opinion, at 828.

For these reasons, the Court reaffirms its rejection of Plaintiffs' facial challenges to the Ordinance's new structural, visibility, and lighting requirements.

B. *Deadline for Compliance*

In their Motion for Reconsideration, the N.W. Enterprises Plaintiffs requested a stay of the City's enforcement of the Ordinance's structural provisions pending Plaintiffs' appeal of this issue, or, in the alternative, a briefer stay that would allow them time to comply with these provisions. *See* N.W. Enterprises Plaintiffs' Motion for Reconsideration [Doc. # 343], at 1-2, 4-6. This issue is now moot, since the Court ruled in the March 2, 1998, conference that the arcade and mini-theatre Plaintiffs would have 120 days to complete necessary renovations, with one 30-day extension if needed.

C. *VIP Rooms*

1. Procedural Background

In the prior summary judgment briefing, one of the FTU Plaintiffs, Ice Embassy, raised an "as applied" challenge to two provisions of the Ordinance, §§ 28-136(b) and 28-258(c), that prohibit entertainment from being provided in enclosed areas of sexually oriented businesses. Specifically, Ice Embassy argued that these provisions could not constitutionally apply to a large "VIP room" within an adult cabaret that is separated by a transparent door from the main area of the cabaret but that conforms with the

Ordinance's other structural, visibility, lighting, supervision, and police access requirements.

In the Summary Judgment Opinion, the Court upheld the *facial* validity of §§ 28-136(b) and 28-258(c) as content-neutral means of preventing negative secondary effects, such as criminal public lewdness violations, from occurring within sexually oriented businesses. *See* Sum. Jmt. Opinion, at 824-27. In support of this conclusion, the Court noted that the legislative record "is replete with testimony and discussion of criminal offenses, such as public lewdness, that occur most frequently when physical obstructions and low levels of lighting exist within these businesses." *Id.* at 826 (citations omitted). However, the Court specifically stated that "this ruling does not purport to address the 'as applied' challenge Ice Embassy has raised to §§ 28-136(b) and 28-258(c) with respect to large VIP rooms." *Id.* at 827.

Over the City's objection, the Court allowed Ice Embassy to amend its Complaint to raise this "as applied" challenge. *See* Sum. Jmt. Opinion, at 825-26. The Court also instructed the City that, if it intended to interpret §§ 28-136(b) and 28-258(c) as applying to the type of large VIP room that Ice Embassy described, then it would have to respond to Ice Embassy's Motion for Partial Summary Judgment [Doc. # 258] on this issue. The Court reserved ruling on this issue in its Summary Judgment Opinion because it had not been fully briefed but noted its concern that the legislative record did not appear to contain any evidence that would justify the application of the prohibition against adult entertainment in enclosed areas to large VIP rooms. *See* Sum. Jmt. Opinion, at 827 n. 145.

The City has now responded to Ice Embassy's Motion, see City's Response in Opposition to FTU Plaintiff Ice Embassy, Inc.'s Motion for Partial Summary Judgment Regarding VIP Room [Doc. # 355], and Ice Embassy has submitted a Reply to the City's Response [Doc. # 385]. In its Response, the City indicates that it intends for §§ 28-136(b) and 28-258(c) to apply to large VIP rooms, as well as smaller enclosed areas. The City argues that the legislative record contains sufficient evidence to show that the City Council enacted these provisions in order to combat negative secondary effects created by adult entertainment in enclosed areas, *including* large VIP rooms, and that therefore these provisions are content-neutral, even as applied to these large rooms, and should be upheld under First Amendment intermediate scrutiny.[66]

2. Analysis

After reviewing the parties' legal memoranda and exhibits on this issue, and particularly the portions of the legislative record on which the City relies, the Court concludes that the legislative record does not contain evidence to support the City's contention that §§ 28-136(b) and 28-258(c) were enacted in order to combat negative secondary effects in large VIP rooms that conform with all

[66] The City continues to argue that Ice Embassy does not have standing to raise this challenge, since Ice Embassy has not yet built its proposed VIP room. However, Ice Embassy has invested the funds to design and obtain architectural drawings for the proposed addition and renovation to its facility. The City has provided no authority to challenge the Court's decision that Ice Embassy is entitled to a ruling on the constitutionality of these provisions as applied to its proposed VIP room before it invests as much as $400,000 to build the room. *See* Sum. Jmt. Opinion, at 826 n. 143.

the Ordinance's other structural, visibility, lighting, supervision, and police access requirements. Therefore, as applied to a room such as the one described by Ice Embassy, these provisions are content-based and thus subject to First Amendment strict scrutiny. Under this standard, the Court concludes that application of these provisions to such a room would be an unconstitutional restriction on speech and therefore cannot be enforced.[67]

Ice Embassy's proposed VIP room will be more than 4,000 square feet large, will hold more than 200 people, and will be separated from the main part of the business by a completely transparent heavy glass door with no locking mechanism. *See* Declaration of Robert Furey ("Furey Declaration") [Doc. # 260], ¶ 10.

The evidence of negative secondary effects contained in the legislative record that supports the facial validity of §§ 28-136(b) and 28-258(c) does not relate to the type of large VIP room that Ice Embassy describes in its Supplemental Complaint [Doc. # 256], Motion for Partial Summary Judgment [Docs. # 258 and 259], and the accompanying declaration [Doc. # 260]. In enacting these requirements, City Council members were concerned about the prevalence of lewd or other criminal acts within sexually oriented businesses in dark or small enclosed areas that managers and police officers cannot see from a distance. Although Council members and police officers who spoke to the Sexually Oriented Business Committee mentioned that large VIP rooms *exist* in some adult

[67] In the alternative, even if the Court should analyze these provisions as content-neutral, it would nevertheless strike down their application to the large type of room described in this section because such an application would not be sufficiently narrowly tailored.

cabarets, there was no evidence presented that, or discussion as to how, a prohibition against providing adult entertainment in enclosed areas – the prohibition eventually enacted in §§ 28-136(b) and 28-258(c) – would curtail negative secondary effects in large VIP rooms that provide clear lines of sight for managers throughout the rooms and conform with other structural, visibility, lighting, supervision, and police access requirements.[68]

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[68] In making this finding, the Court has carefully reviewed portions of the legislative record relating to VIP rooms, including the exhibits that the City cites in support of its arguments specifically Exhibit 36 to the City's Motion for Summary Judgment [Doc. # 120], at 5-6; Exhibit 8D, at 6; Exhibit 8E, at 85-121; Exhibit 9D, at 54-55; and Exhibit 40. The following testimony illustrates the type of evidence upon which the City relies. During one Sexually Oriented Business Committee meeting, a police officer testified as follows:

> The visibility aspect, obviously, it's dark inside. A lot of times, employees, dancers, they employ methods of disguising their actions by using furniture and built-in sort of places in the clubs themselves that lend themselves to be more out of sight than others. Obviously, it goes back to the dark aspect. It's very hard to see if you're any length away from another table.

Transcript of August 29, 1996, Committee Meeting, Exhibit 8E to City's Motion for Summary Judgment [Doc. # 120], at 85-86. This testimony obviously relates to the issues of visibility, clear lines of sight, and lighting, not to whether an adult cabaret has a door at the entrance to a 4,000 square foot VIP room. In that same meeting, another officer explained that:

> [O]nce [the dancers] feel comfortable with you, they'll ask you to move to a different part of the club, a secluded area or even they'll ask you to give them some money to tip the managers or the floor person so that they will look the other way while they perform a table dance.
>
> As far as prostitution is some of these places, we've conducted many investigations and in one particular club we had a black light run up right into the VIP room. The black

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The City appears to admit that the only reason why Ice Embassy's proposed VIP room would violate §§ 28-136(b) and 28-258(c) is that Ice Embassy intends to put a door at the entrance of the room.[69] Ice Embassy has stated that it wants to have a door separating its VIP room from the main area of its business in order to prevent noise from the main area from intruding on the VIP room. Ice Embassy represents in its Supplemental Complaint and in its Motion for Partial Summary Judgment that it intends for its VIP room to comply with the other Ordinance provisions, including the police access requirement of § 28-136(c).[70] *See* Supplemental Complaint of Plaintiff Ice

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light shows semen residue all over their couches. Used condoms were discovered on the floor.

Id. at 88. Again, nothing in this testimony conveys how the presence or absence of a door separating a large VIP room from the main area of a club would affect whether criminal activity takes place within the room. Instead, the issue raised by this testimony is clearly whether these rooms, like the main areas of the businesses, have adequate lighting, visibility, supervision, and police access.

[69] In its Response to Ice Embassy's Motion for Partial Summary Judgment, the City states that:

> Section 28-136(b) *simply does not prohibit* the existence of VIP rooms in an enterprise, but rather only the provision of entertainment in a separate area to which access is "blocked or obscured by any door, curtain or other barrier." Thus, regardless of the size of the VIP room, the prohibition is of the door or other barrier, and the absence of a door does not prohibit the enterprise from having such a VIP room as claimed by plaintiffs. City's Response Regarding VIP Room [Doc. # 355], at 2 (emphasis in original).

[70] This provision states that:

> It shall be the duty of any owner, operator or manager of an enterprise to allow immediate access by any police officer, city fire department official or health officer to any portion of the premises of the enterprise upon request for purpose of

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Embassy [Doc. # 256], at 8. *See* also Furey Declaration, ¶ 8 (describing how the business will provide free, anonymous membership cards for undercover police officers).

The City's specific concern about such a door is that it believes it would be more difficult for police officers to enter a VIP room that has a door at its entrance than an identical VIP room that does not have such a door. The City does not explain, however, how the absence of a door would make Ice Embassy, or other similarly situated adult businesses, less likely to comply with the police access requirement.[71] More significantly, however, the legislative

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inspection of such premises for compliance with this article, or any other applicable law.

§ 28-136(c).

[71] The City appears to be concerned that a door at the entrance to a VIP room would prevent police officers from entering the room and immediately seeing whether any offenses are occurring. *See* City's Response Regarding VIP Room [Doc. # 355], at 6 (citing Transcript of August 19, 1996, Committee Meeting, Exhibit 7G to City's Motion for Summary Judgment [Doc. # 120], at 14243 (police officer explained to Committee that "what we're looking for is the ability for an undercover officer to walk in and look around to see if this club is engaging in illegal activity in a very short period of time")). However, the City has not detailed why the mere presence or absence of a door at the entrance to a large VIP room would affect whether police officers could instantly see activities within the room once they stepped inside the room. In the specific case at issue here, Ice Embassy's proposed VIP room would not only have a door with transparent glass and no locking mechanism, but also have a vestibule and what appears to be a narrow hallway at its entrance; thus, a police officer could not see inside the room until first passing through the vestibule and hallway anyway. *See* Exhibits A and B to Furey Declaration [Doc. # 260] (copies of floor plans for Ice Embassy's proposed VIP room). Finally, there is no evidence in the record of any warning signal to indicate the approach of police officers, or of the City's concern about such mechanisms at the Ice Embassy's proposed VIP room. Thus, it is entirely unclear why it would make any difference whether or not there is a door at the end of this hallway and vestibule.

record contains no indication that City Council members considered evidence regarding, or even discussed the possibility that, prohibiting an adult business from placing a door at the entrance of a VIP room that holds 200 people would help reduce any criminal activity that may occur within that room.

The City's justification and evidence simply do not apply to large VIP rooms that conform with the Ordinance's other structural, visibility, lighting, supervision, and police access requirements. Although there was passing reference during Committee discussions to the possibility of prohibiting VIP rooms entirely,[72] no such prohibition was enacted. Council members never discussed the possibility of allowing the VIP rooms to remain, but without doors at their entrances. Therefore, as noted above, there is no evidence in the legislative record explaining how the mere absence of a door at the entrance to a 4,000 square foot room, which holds more than 200 people, is appropriately lit, and is fully visible to management, would further the City's interest in reducing criminal activity inside sexually oriented businesses.[73] The

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[72] *See, e.g.*, Transcript of August 29, 1996, Committee Meeting, Exhibit 8E to City's Motion for Summary Judgment [Doc. # 120], at 94 (Co-Chair Boney asks whether "the elimination of these secluded areas, VIP rooms, would that substantially eliminate some of this overt criminal behavior?" Police officer replies, "[e]xactly.").

[73] Another possible justification for the application of §§ 28-136(b) and 28-258(c) to large VIP rooms is the City's concern about the cost of criminal investigations within these rooms. The Sexually Oriented Business Committee heard testimony that adult cabarets usually charge a high fee for access to their VIP rooms which has hampered the ability of the City police force to conduct undercover operations, since the City often cannot afford to pay these fees. *See* Legislative Report for Ordinance 97-75, Exhibit 36 to City's Motion for Summary Judgment [Doc. # 120], at 6. However, the City Council did not act on this concern

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evidence in the record establishes that the City's prohibition against doors or other barriers blocking entrances to enclosed areas was enacted in order to prevent criminal activity from occurring in small enclosed areas not visible to managers or police officers, such as rooms in adult bookstores and arcades.[74]

The Court therefore holds that §§ 28-136(b) and 28-258(c) of Ordinance 97-75 may not be applied to the VIP room described by Ice Embassy in its Supplemental Complaint, a large separate room within an adult business, where the room is in compliance with the other structural, visibility, lighting, supervision, and police access requirements of the Ordinance.[75] Because Plaintiffs

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by prohibiting entrance fees for VIP rooms. Moreover, this concern is vitiated by Ice Embassy's representation in its Supplemental Complaint and Motion for Partial Summary Judgment, that it will provide free anonymous passes to the police department so that police officers can perform undercover investigations. *See* Supplemental Complaint of Plaintiff Ice Embassy [Doc. # 256], at 8. In any event, even if undercover police officers have to pay a fee to enter a separate area of an adult cabaret, the City has provided no reason as to why the presence or absence of a door, particularly one made of transparent glass, at the entrance to a large, appropriately lit area visible to management, would have any effect on the ability of police officers to enter and conduct investigations.

[74] *See, e.g.*, Transcript of August 29, 1996, Committee Meeting, Exhibit 8E to City's Motion for Summary Judgment [Doc. # 120], at 101-04 (police officers explain to City Council Committee that anonymous sex occurs behind closed doors in small four-foot-by-four-foot or six-foot-by-six-foot rooms in adult bookstores); Transcript of September 16, 1996, Committee Meeting, Exhibit 9D to City's Motion for Summary Judgment, at 54 (after describing enforcement problems inside sexually oriented businesses, Captain Chandler tells Committee "[w]e would ask there be no doors on the booths inside of adult arcades").

[75] The Court emphasizes that its holding on this issue is an "as applied" ruling. Because the only VIP room that has been described to the Court and that the Court has been asked to rule on is the room

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have prevailed on this issue under a First Amendment analysis, the Court need not address Plaintiffs' alternative challenge to §§ 28-136(b) and 28-258(c) under the Equal Protection Clause.[76]

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specifically described by Ice Embassy, the Court limits its holding to the scenario described in Ice Embassy's amended complaint. In this scenario, a 4,000 square foot room is separated from the rest of the business only by a completely transparent glass door without any locking mechanism, and the interior of the room complies with the Ordinance's other structural, visibility, lighting, supervision, and police access requirements. The Court assumes from Ice Embassy's complaint that there is no "secret" warning system by which management can surreptitiously alert personnel in the VIP room of the approach of a police officer, thereby destroying the officer's ability to inspect inconspicuously the premises and to do so without management's artificial interruption of activities that were taking place immediately prior to the officer's arrival at the VIP room.

The City urges the Court to reject Ice Embassy's "as applied" challenge because the City fears that an invalidation of §§ 28-136(b) and 28-258(c) with respect only to large VIP rooms such as the one described by Ice Embassy would create too much uncertainty regarding the circumstances under which the City could enforce these provisions. Although the Court recognizes that there may be, in another case, some circumstances in which it might be difficult to determine whether this Court's "as applied" invalidation of these provisions would prohibit their enforcement, that analysis would be fact-intensive and is not before the Court at this time. For the purposes of this ruling, it is sufficient for the Court to note that there is a clear distinction between large separate VIP rooms, which comply with all other structural, visibility, lighting, supervision, and police access requirements, and smaller enclosed areas, about which the City Council Committee heard evidence that prohibiting doors and non-transparent barriers would reduce criminal activity.

[76] However, as noted *supra* in Section III.D.2, sexually oriented businesses are not entitled to heightened protection under the Equal Protection Clause and thus any restrictions on them are subject to only the lowest form of equal protection scrutiny, the rational basis test. Plaintiffs have not cited any authority to support their request that the Court invalidate these provisions as applied to Ice Embassy's proposed VIP room under the Equal Protection Clause. Instead, they cite only

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VII. *SIGNAGE*

A. *First Amendment and Texas Constitution Challenge*

In the Summary Judgment Opinion, the Court rejected Plaintiffs' challenge brought under the First Amendment and Texas Constitution to the Ordinance's restrictions on sexually oriented businesses exterior signage. *See* Sum. Jmt. Opinion, Section V.F. Although the Court noted concern about the severity of these restrictions, the Court held that it was nevertheless bound under the authority of *SDJ* to uphold these restrictions. *See* Sum. Jmt. Opinion, at 832-33. Encouraged by this concern, the Dee & Dee Plaintiffs have requested that this Court reconsider its reliance on *SDJ* in upholding the Ordinance's signage restrictions under the First Amendment. *See* Dee & Dee Plaintiffs' Corrected Motion for Reconsideration [Doc. # 376], at 19-20. However, for the reasons described in the Summary Judgment Opinion, the Court declines this request. If the Court of Appeals chooses to reconsider its conclusions based on more recent Supreme Court First Amendment cases from other contexts, it may do so. Until and unless such reconsideration occurs, this Court must abide by the holding of *SDJ*.[77]

Minneapolis Star and Tribune Co. v. Minnesota Com'r of Revenue, 460 U.S. 575, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983), which was not an Equal Protection case but was instead a First Amendment case. *See* Brief in Support of FTU Plaintiff Ice Embassy, Inc.'s Motion/Cross-Motion for Partial Summary Judgment [Doc. # 259], at 14.

[77] Plaintiffs incorrectly assert that the Court found Plaintiffs' attacks on the signage requirements justified in light of *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996), and *City of Ladue v. Gilleo*, 512 U.S. 43, 114 S.Ct. 2038, 129 L.Ed.2d 36 (1994). In fact, in its Summary Judgment Opinion, the

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In connection with their arguments regarding signage, the Dee & Dee Plaintiffs also reassert their argument that the Supreme Court altered the narrow tailoring prong of the First Amendment test in *Ward v. Rock Against Racism,* 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). They argue that therefore the Fifth Circuit's conclusion in *SDJ* regarding the Ordinance's signage provisions is no longer valid because *SDJ* predated the *Ward* Court's revision of the narrow tailoring requirement. In the Summary Judgment Opinion, however, the Court specifically rejected the argument that *Ward* altered the test applied by the Fifth Circuit in *SDJ*. *See* Sum. Jmt. Opinion, at 775 n. 44. Plaintiffs do not cite any new authority or raise any new argument to challenge the Court's conclusion on this issue. Thus, the Dee & Dee Plaintiffs' signage arguments are rejected.

B. *Texas Statutory Challenge*

1. Procedural Background

In the Summary Judgment Opinion, the Court held that the Ordinance's expanded regulation of sexually oriented business signage, contained in § 28-130(g), does not violate the First Amendment or the Texas Constitution. *See* Sum. Jmt. Opinion, Section V.F. The FTU Plaintiffs argued that, even if this provision is constitutionally valid, the City may not enforce it without first complying with a state statute, Tex.Loc. Gov't Code § 216.001 *et seq.* ("§ 216"), which provides for procedural protection and compensation for individuals or entities affected by municipal signage

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Court specifically distinguished these cases. *See* Sum. Jmt. Opinion, at 833.

regulation. Concluding that Plaintiffs' argument regarding § 216 appeared on the surface to have substance but had not been fully briefed by the parties, the Court provided the parties further opportunity to develop their positions and the facts on this issue. *See* Sum. Jmt. Opinion, Section V.F.4.[78]

Thereafter, the FTU and A.H.D. Plaintiffs amended their complaints to add express causes of action under § 216. *See* FTU Plaintiffs' Second Amended Complaint [Doc. # 350], at 75-76;[79] A.H.D. Plaintiffs' Second Amended Complaint [Doc. # 358], at 28-31. The City now has moved for summary judgment on this issue, arguing that § 216 does not apply to the regulation contained in § 28-130(g) of the Ordinance. *See* City's Motion for Summary Judgment on Ordinance 97-75, Article III, Section 28-130(g) [Doc. # 397] and City's Supplement to Docket No. 397 [Doc. # 430]. The FTU Plaintiffs have filed a Response and Cross-Motion on this issue. *See* FTU Plaintiffs' Response in

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[78] The Court declined to address Plaintiffs' constitutional argument that the expanded signage regulation constituted an unlawful taking without compensation since it appeared that this issue could be obviated by resolution of Plaintiffs' state statutory argument. *See* Sum. Jmt. Opinion, at 835. Thus, the City is incorrect in its assertion that the Court ruled on Plaintiffs' takings argument with respect to the Ordinance's expanded signage regulation. *See* City's Motion for Summary Judgment on Ordinance 97-75, Article III, Section 28-130(g) [Doc. # 397], at 5. The Court's discussion of takings law in the Summary Judgment Opinion, at 817-18, relates solely to the Plaintiffs' argument that, if the Ordinance prevented them from continuing to provide adult entertainment at their current locations, that change would constitute a taking.

[79] Since that time, the FTU Plaintiffs have attempted to file a Third Amended Complaint [Doc. # 434], which the City opposes. The Court addresses the FTU Plaintiffs' Motion for Leave to file this third complaint *infra* in Section X.

Opposition to the City of Houston's Motion for Summary Judgment on Ordinance 97-75, Article III, Section 28-130(g), and the FTU Plaintiffs' Cross-Motion for Summary Judgment [Doc. # 435]. In addition, several of the FTU and A.H.D. Plaintiffs have, in accordance with this Court's instructions, filed declarations indicating the costs they have incurred in purchasing their existing signage and the costs they anticipate incurring if they must remove or alter that signage. *See* Declaration of Men's Club of Houston President David Fairchild [Doc. # 384]; Affidavit of A.H.D. Plaintiff Ali M. Davari [Doc. # 411]; Declarations of Colorado Manager Robert G. Furey [Docs. # 373 and 437].[80]

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[80] The City argues that the Colorado Club does not have standing to raise an argument under § 28-130(g) because it is not located in a multi-unit center, as defined by § 28-130(g). *See* City's Motion for Summary Judgment on Ordinance 97-75, Article III, Section 28-130(g) [Doc. # 397], at 6-8. Based on an inspection conducted by Officer Robert Foulis, see Affidavit of Robert Foulis, Attachment to City's Motion, the City asserts that the other businesses located in the Colorado Plaza do not have entranceways directly onto public property, a public way, or a common area, and that therefore the Colorado Club is subject to the Ordinance's signage restrictions regardless of the validity of the City's attempt to implement § 28-130(g) without complying with § 216 of the Texas Local Government Code. In response, the FTU Plaintiffs argue that the Colorado Club is indeed located in a multi-unit center because the other businesses have the required entranceways on a side of the complex that Officer Foulis failed to inspect. *See* FTU Plaintiffs' Response and Cross-Motion for Summary Judgment [Doc. # 435], at 20-21. This Court need not and will not decide this fact question. Regardless of whether the Colorado Club has standing, there is still a justiciable controversy with respect to the applicability of § 216 because there are other Plaintiffs who also raise this statutory claim and for whom the City does not argue that § 28-130(g) does not apply.

2. Analysis

In its new summary judgment motion, the City contends that it does not need to comply with the provisions of § 216[81] because that chapter only pertains to signs that must be "relocated, reconstructed, or removed." § 216.001 *et seq.* The City argues in a strained turn of phrase that § 28-130(g) will merely require "alteration" or "conver[sion]" of Plaintiffs' signs. *See* City's Motion for Summary Judgment on Section 28-130(g) [Doc. # 397], at 2, 4.

The City has failed to persuade the Court that there is any meaning in the distinction it attempts to draw. In support of its argument, the City asserts that Plaintiffs could comply with § 28-130(g) by simply changing the lettering on their existing signs so that the signs do not display the names of or otherwise identify Plaintiffs' businesses. *See* City's Motion for Summary Judgment on Section 28-130(g) [Doc. # 397], at 4. Even if this assertion is correct, the City does not explain why such a change would not constitute "reconstruction" of the nonconforming signs and thus be encompassed within the scope of § 216. More importantly, however, the City's witness on this issue, Ollie Schiller from the City's Sign Administration Division, concedes that such a change would be a "reconstruction." In her supporting affidavit, she avers that:

> Based upon my experience and expertise in administering the sign code, with respect to sign

[81] As described in the Summary Judgment Opinion, various provisions of § 216 require a municipality that extends or strengthens its signage regulations to designate a sign control board that must compile a list of non-conforming signs and to provide compensation for owners of non-conforming signs. *See* Sum. Jmt. Opinion, at 835-36.

> modifications and changing of the letters, symbols or other advertising matter on sign cabinets, it is my opinion that changing the message referring to the Colorado on the subject signs would not require the removal of the sign structure or *substantial reconstruction* of the sign and structure. Rather, this could be accomplished by replacement of the individual channel letters, Colorado, to any other name.

Affidavit of Ollie Schiller, Attachment to City's Motion for Summary Judgment on Section 28-130(g) [Doc. # 397], at 2 (emphasis added).[82] Although Schiller attempts to downplay the extent of the reconstruction that might be necessary, this statement clearly concedes that at least *some* reconstruction will be necessary in order for Plaintiffs' signage to be in compliance with the Ordinance.[83] The

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[82] The FTU Plaintiffs have filed Objections [Docs. # 438 and 461] to Schiller's affidavits on the grounds that they contain impermissible legal opinions, ambiguous testimony, unsubstantiated expert opinions, and hearsay. The Court **OVERRULES** these objections for the same reasons it overruled similar objections raised in the FTU Plaintiffs' prior briefing. *See* Sum. Jmt. Opinion, at 830-31 n. 152. In any event, as described below in the accompanying text, Schiller's testimony supports Plaintiffs' argument that § 28-130(g) will require reconstruction of their signs and also demonstrates that the parties have factual disagreements that will need to be resolved by the City-designated sign board.

In a similar vein, the City has filed Objections to the declarations of Plaintiffs' witnesses Raschid Chawdhary and David A. Furlow [Doc. # 468] regarding the signage issue. The Court did not rely on these declarations because they are not relevant to the legal issues properly presented here. The City's Objections [Doc. # 468] are **OVERRULED** as moot.

[83] In her more recent affidavit, Schiller again acknowledges that some reconstruction will be necessary through her averment that § 28-130(g) will not impose on the FTU Plaintiffs "the necessity of *completely* removing and replacing the signage." Affidavit of Ollie Schiller, Attachment to City's Response in Opposition to FTU Plaintiffs' Cross Motion for Summary Judgment [Doc. # 456] (emphasis added).

Court takes judicial notice of the fact that restructuring signage, like just about anything in this world, will have *some* cost. The City has not cited, and the Court has not found, any provision of § 216 of the Tex. Loc. Gov't Code that indicates that the statutory chapter only applies when the cost involved in complying with new signage regulations is above some minimum threshold.

It is clear from the parties' filings on this issue that there are material factual questions as to how much reconstruction will actually be necessary and thus what those costs will be. For instance, Plaintiffs deny that they could retain their signs and be in compliance with § 28-130(g) of the Ordinance merely by changing the lettering on those signs. Instead, they argue that, for a number of the signs at issue, the current lettering is integral to the sign structures and could not simply be removed and replaced with other lettering. *See* FTU Plaintiffs' Response and Cross-Motion for Summary Judgment [Doc. # 435], at 4-6.

The Court does not need to resolve the factual disputes regarding the extent of reconstruction, or even removal, of Plaintiffs' signs that will be necessary for Plaintiffs to comply with § 28-130(g) of the Ordinance and thus how much it will cost Plaintiffs to comply with this provision. That is precisely the purpose of § 216 of the Texas Local Government Code – to establish a procedure by which this type of factual dispute may be resolved, as well as to create a mechanism for a municipality to provide compensation for any necessary reconstruction or removal of signs due to municipal regulation. *See* § 216.007 ("[t]he board shall determine the compensable costs according to standards applicable in a proceeding

under Chapter 21, Property Code").[84] Thus, the Court will leave the resolution of these factual disputes to the board that the City must designate in accordance with § 216.004 and to the state district courts pursuant to § 216.014, if any appeals are necessary.[85]

For the reasons just described, the Court holds that the City may not enforce § 28-130(g) without first complying with § 216 of the Texas Local Government Code.

3. A.H.D. Plaintiff's Motion to Join

On April 16, 1998, the A.H.D. Plaintiffs filed a Motion to Join the FTU Plaintiffs' Response and Cross-Motion for Summary Judgment regarding signage [Doc. # 445]. Assuming this motion to be unopposed, the Court granted the Motion on April 17, 1998. *See* Order [Doc. # 447]. The City has now filed a Response [Doc. # 458] to this Motion, in which it states that it opposes allowing the A.H.D. Plaintiffs to join the FTU Plaintiffs' Response and Cross-Motion [Doc. # 435] because that Response and Cross-Motion was

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[84] Section 216.007 also provides that "[t]he compensable costs for a sign that is required to be reconstructed include expenses of labor and materials and any loss in the value of the sign due to the reconstruction in excess of 15 percent of that value."

[85] The parties also appear to disagree about which of Plaintiffs' signs are affected by § 28-130(g). Although Plaintiffs believe that they will have to remove practically all signs located on the exteriors of their businesses, including signs related to valet parking, hours of operation, and even security systems, the City's arguments regarding which signs might need to be altered appear only to relate to Plaintiffs' large signs which display the names of or otherwise identify Plaintiffs' businesses. Resolution of these disputes regarding the applicability of the Ordinance's regulations may also be resolved by the designated sign board and state courts.

accompanied by evidence pertinent to the signage of the FTU Plaintiffs, not the A.H.D. Plaintiffs. The City notes that it has previously objected to the A.H.D. Plaintiffs' purportedly untimely attempt to submit its own evidence regarding signage.

The Court rejects the City's opposition to the A.H.D. Plaintiffs' Motion to Join [Doc. # 445] and reaffirms its Order of April 17, 1998 [Doc. # 447]. The Court's ruling in favor of Plaintiffs on the signage issue is primarily a legal conclusion, not a factual finding based on the FTU Plaintiffs' evidence. The A.H.D. Plaintiffs' evidence to which the City objects only provided additional support for the Court's conclusion that at least *some* costs will be involved for Plaintiffs located in multi-unit centers, that are not already in compliance with the signage provisions, to comply with § 28-130(g).[86]

Thus, the Court's conclusion that, before enforcing the Ordinance's new signage provision, the City must follow the procedures set forth in § 216 of the Texas Local Government Code applies to all Plaintiffs who will be affected by the new signage provision, not just the Plaintiffs who have submitted evidence regarding the costs involved in complying with the provision.

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[86] The Court therefore also overrules the City's Objections to Plaintiffs' Evidence [Doc. # 457] on the signage issue. In these objections, the City finds fault with virtually every paragraph of the affidavits submitted in support of the FTU Plaintiffs' Response and Cross-Motion for Summary Judgment regarding signage. It is not necessary for the Court to provide a detailed legal analysis of the admissibility of every paragraph of these affidavits because they are simply not dispositive of the Court's ruling.

As neither party has raised any genuine issue of material fact regarding the general applicability of § 28-130(g), the Court **GRANTS** the FTU Plaintiffs' Cross-Motion for Summary Judgment on § 28-130(g) [Doc. # 435] and **DENIES** the City's Motion for Summary Judgment on § 28-130(g) [Doc. # 397].

VIII. *ENTERTAINER AND MANAGER PERMIT REQUIREMENT*

In the Summary Judgment Opinion, the Court generally upheld the Ordinance's new requirement that entertainers and managers working in sexually oriented businesses must obtain individual permits. However, the Court restricted what types of personal information the City could collect from permit applicants and declared all information collected to be confidential and not subject to disclosure under the Texas Public Information Act. In addition, the Court struck down a requirement that entertainers must wear identification cards while working. Since the time the Summary Judgment Opinion was issued, a number of issues have arisen with respect to the permit requirement. These issues, along with the parties' motions for reconsideration of various issues relating to the permit requirement, are discussed below.

A. *Date on Which Enforcement May Begin*

1. Permit Requirement in General

Due to Plaintiffs' concern that all entertainers and managers who are currently working at adult businesses and want to apply for permits under the Ordinance would not be able to complete the application process by the previously agreed upon deadline of April 6, 1998, the

Court entered an order on April 7, 1998, extending the date on which the City could begin enforcing the permit requirement for entertainers and managers to June 5, 1998. *See* Order [Doc. # 432].[87] On April 24, 1998, the City filed a Motion to Dissolve this Order [Doc. # 451], in which it requested that the Court allow it to begin enforcing the permit requirement immediately. The FTU and A.H.D. Plaintiffs filed responses opposing this Motion [Docs. # 459 and 460].

The City's Motion is denied. In light of the fact that the extended date already has passed and the permit requirement has gone into effect, the issue is moot.[88]

2. Individuals Who Have Already Been Working at Adult Businesses

In the Summary Judgment Opinion, the Court ruled that:

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[87] Under the terms of this Order, entertainers and managers must have filed their permit applications by May 22, 1998, in order to continue working pending processing of their applications.

[88] Pursuant to § 28-254 of the Ordinance, individuals may apply for permits between the hours of 8:00 a.m. and 12:00 p.m. on Mondays, Wednesdays, and Fridays. Nothing in the Ordinance states that these hours were to change after the permit requirement went into effect. According to this provision, individuals who want to obtain original or renewal permits can submit applications at these times. Of course, any individuals who apply for permits after June 5, 1998, will not be able to work until they have received their permits. This is because, prior to the date enforcement began, the City provided a mechanism, as required by the Court's Summary Judgment Opinion, for individuals who were already working at adult businesses on February 18, 1998, to continue working pending the processing of their applications.

> any manager or entertainer who is working at a protected enterprise immediately before the individual permit requirement goes into effect must be allowed to continue working, whether or not a temporary permit is obtained, pending the processing of her or his permit application and pending any appeal of a permit denial.

Sum. Jmt. Opinion, at 858-59. The Court based this decision on *TK's Video,* 24 F.3d at 708-09, in which the Fifth Circuit held that a municipality must maintain the *status quo* for licensees that were in business prior to the enactment of a new licensing regulation. *See* Sum. Jmt. Opinion, at 846.

However, upon further consideration of the *TK's Video* opinion, the Court concludes that the *status quo* need not be maintained throughout the *entire* appeal of a permit denial. Instead, *TK's Video* merely requires that the *status quo* be maintained "during the licensing process" and for a "brief period" in which unsuccessful applicants may "access the courts." *TK's Video,* 24 F.3d at 708-09. Thus, the Court's previous order is withdrawn to the extent that it requires an unsuccessful permit applicant who filed an application by the deadline, and who was already working at an adult business when the permit requirement went into effect, to be allowed to continue working until the entire judicial appeal of the applicant's permit denial is complete. Instead, the City may begin enforcing the permit requirement against such an individual thirty days[89] after

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[89] The Court incorporates the thirty day period provided by § 28-257 of the Ordinance for a permit holder to seek an injunction or obtain judicial review of a permit revocation decision. This length of time was deemed constitutionally sufficient in *TK's Video,* 24 F.3d at 709.

the individual's application is rejected, unless the individual receives a state court injunction enjoining the City's enforcement of the permit requirement pending judicial review.[90]

B. *Collection of Personal Information*

1. Phone Numbers and Home Addresses

In the Summary Judgment Opinion, the Court enjoined the City from requiring entertainers and managers to disclose their phone numbers and home addresses on their permit applications. *See* Sum. Jmt. Opinion, at 840-41, 859. In its Motion for Reconsideration, the City requests that the Court reconsider this injunction. *See* City's Motion for Reconsideration [Doc. # 364], at 14-17.

The City's request is based on logistical difficulties it encountered in attempting to communicate with applicants about the results of their permit applications. It appears, however, that these logistical difficulties resulted at least in part from a misinterpretation of the Court's injunction. The Court clarified the injunction at the conference held on April 7, 1998. As explained orally at

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[90] Pursuant to the Court's Order of April 7, 1998 [Doc. # 432], the application deadline for individuals to receive this *status quo* protection was May 22, 1998. *See supra* note 87. In addition, at the conference held on February 20, 1998, the Court declared that, for purposes of determining which individuals were entitled to this *status quo* protection, the date the permit requirement was upheld, February 18, 1998, would be considered the date the permit requirement went into effect. Thus, all entertainers and managers who were working at adult businesses in Houston on or immediately before February 18, 1998, and who applied for permits by May 22, 1998, cannot be prohibited from continuing to work at adult businesses, even if their applications were denied, until thirty days after their applications are rejected.

that conference, the Court ruled that the City could not *require* permit applicants to disclose their phone numbers and home addresses. The Court did not, however, prohibit the City from inviting each applicant to disclose her or his phone number (or numbers) and home addresses, *if* the applicant chose to do so. Also, by prohibiting the compelled disclosure of home, but not other, addresses, the Court expected that the City would request that each applicant provide some address for mailing purposes; the City was simply prohibited from requiring the address to be a "home" address.

Thus, the Court declines the City's request to reconsider the injunction against compelled collection of applicants' phone numbers and home addresses. Under the injunction, the City may still obtain other addresses by which it can communicate with permit applicants. Moreover, there is no evidence that the City's lack of applicants' phone numbers and home addresses has impeded its ability to conduct criminal history checks on applicants.

In the alternative, the City argues that the injunction against compelled disclosure of phone numbers and home addresses is not necessary because the Court declared the application information to be confidential and not subject to public disclosure. *See* Sum. Jmt. Opinion, Section V.G.4. The Court declines to reconsider this injunction, primarily because the City has not shown any real justification for needing this information and because the City is permitted to request the information so long as it is listed as "optional" on the application. The injunction is also well supported by the Court's concern about the chilling effect that such disclosure requirements could have on entertainers and managers, even with a court order prohibiting the release of the information to the public.

2. Criminal History

a. Propriety of Court's Injunction

The City also requests that the Court reconsider its injunction prohibiting the City from requiring applicants to disclose convictions or jail time spent for those convictions prior to five years before they file their applications or convictions for crimes other than those enumerated in the Ordinance. *See* Sum. Jmt. Opinion, at 841, 859; City's Motion for Reconsideration [Doc. # 364], at 17. The City argues that this injunction is unnecessary because this information was not required by the Ordinance itself but was instead merely included on the City's original application form that has now been modified in compliance with this injunction.

The Court rejects the City's request to modify this injunction. As the City concedes, the City's application form previously requested criminal record information beyond that authorized by the Ordinance. The fact that the City complied with the injunction is not a basis for eliminating that injunction. To do so might allow the City to infer that it may now resume requesting overbroad information.[91]

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[91] However, to allay the City's concern that the Court found the Ordinance itself unconstitutional in this regard, the Court points out that its Summary Judgment Opinion does not state that the Ordinance actually required this information. The Court merely held that the City's application of the permit requirement was not narrowly tailored with respect to criminal histories, so that the City in practice was requesting information beyond that authorized by the City Council's enactment. *See* Sum. Jmt. Opinion, at 840-41.

b. Constitutionality of Criminal Background Checks

The FTU and Dee & Dee Plaintiffs urge the Court to reconsider its decision to uphold the Ordinance's requirement that entertainers and managers must undergo criminal background checks in order to obtain permits under the Ordinance. *See* Sum. Jmt. Opinion, at 847; FTU Plaintiffs' Motion for Reconsideration [Doc. # 381], at 36-41; Dee & Dee Plaintiffs' Corrected Motion for Reconsideration [Doc. # 376], at 25. Plaintiffs strenuously argue that the First Amendment prohibits the use of prior criminal offenses to justify future restraints on speech.[92] In

[92] The FTU Plaintiffs claim that their challenge to the Ordinance's requirement that entertainers or managers be denied permits on the basis of prior speech-related violations was not addressed by the City in its Motion for Summary Judgment and that therefore this cause of action was not properly presented to the Court at the time it issued its Summary Judgment Opinion. *See* FTU Plaintiffs' Motion for Reconsideration [Doc. # 381], at 26-35. Plaintiffs argue that, because this issue was not properly presented or fully briefed, it was inappropriate for the Court to grant summary judgment for the City on this cause of action. The Court disagrees. In its Motion for Summary Judgment, the City asserted that the Ordinance's new permit requirement for entertainers and managers is constitutionally valid. *See* City's Motion for Summary Judgment [Doc. # 120], at 41. One of the express purposes of this permit requirement is to prevent individuals who have been convicted of certain offenses from working as entertainers and managers in sexually oriented businesses. *See* Preamble to Ordinance 97-75, at 4 ("Whereas, the City Council finds that persons who are employed in sexually oriented business [sic] should be subject to verification that they have not been convicted of certain crimes . . . "). Thus, the City's contention that this requirement is valid necessarily encompassed Plaintiffs' objection to the criminal background check requirement. As explained in the Summary Judgment Opinion, at 785, "[t]he Court rejects Plaintiffs' attempts to characterize numerous detailed arguments, many of which have been addressed by the parties' briefing and by the Court in this Opinion, as discrete causes of action." This issue was not only raised by the City's summary judgment motion, but the

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support of this challenge, Plaintiffs argue once again that the Fifth Circuit's decision to uphold a similar requirement in *TK's Video,* 24 F.3d at 709, simply contradicts the holdings of other cases, including prior United States Supreme Court opinions.

As stated in its previous Summary Judgment Opinion, the Court is bound by recent Fifth Circuit authority that is directly on point to the issue presented here. If the Fifth Circuit's conclusion was in error, then it is the role of the Fifth Circuit to reconsider that conclusion, not the role of this Court. The Court therefore reaffirms its earlier ruling that the Ordinance's requirement that entertainers and managers obtain individual permits for which they must undergo criminal background checks is constitutionally valid.[93]

Court also addressed it on the merits. *See* Sum. Jmt. Opinion, at 847. Thus, the Court did not merely rule in favor of the City on this point on the ground that Plaintiffs did not adequately brief the issue.

[93] In the Summary Judgment Opinion, the Court noted concern that no Plaintiffs had shown that they have the requisite standing to challenge the criminal background check requirement. *See* Sum. Jmt. Opinion, at 847-48 n. 196 (citing *FW/PBS,* 493 U.S. 215, 234, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990)). The FTU Plaintiffs have now pointed out that several of the FTU Plaintiffs who are entertainers have demonstrated standing by submitting declarations that, within the past five years, they have been convicted of public lewdness while performing in adult businesses. *See* FTU Plaintiffs' Motion for Reconsideration [Doc. # 381], at 37 (citing Declarations of Donna Soto [Doc. # 38], ¶ 4; Leah Marie Wilson [Doc. # 49], ¶¶ 18-23; and Charisma Berry [Doc. # 50], ¶¶ 18-24). The Court agrees that these Plaintiffs have adequately demonstrated their standing to raise this challenge and the concern expressed in the Summary Judgment Opinion regarding standing has now been addressed.

3. Other Information

The A.H.D. Plaintiffs appear to contend that, even after the Court issued its Summary Judgment Opinion and orally clarified at a conference held on April 7, 1998, what information could be required on the entertainer and manager permit application forms,[94] the City continues to demand that applicants disclose overbroad "unauthorized personal information." *See* A.H.D. Plaintiffs' Response to the City of Houston's Motion to Dissolve Emergency Order Extending the Entertainer/Manager Licensing Deadline [Doc. # 460], at 2 (addressed *supra* in Section VIII.A.1). However, Plaintiffs do not specify what other information they continue to object to the City requiring on the permit application forms; nor have they formally requested relief on this issue. The Court therefore will not address this contention.

C. *Confidentiality of Application Information*

The City states that it does not oppose the Court's declaration that permit application information remain confidential. *See* Sum. Jmt. Opinion, Section V.G.4. However, it requests that the Court reconsider its injunction against public disclosure of this information as redundant in light of the Court's ruling that the information is confidential. *See* City's Motion for Reconsideration [Doc. # 364], at 18. The Court entered this injunction simply to make clear in the decretal section of the Summary Judgment Opinion what this confidentiality ruling means and to ease enforcement of this ruling upon future challenges or requests for information. The City has not cited any

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[94] *See supra* Section VIII.B.1.

authority for the proposition that such an injunction is not an appropriate remedy. Accordingly, the Court denies the City's request for reconsideration of this injunction.

D. *Permit Revocation Provisions*

In their Motion for Reconsideration, the FTU Plaintiffs argue that the Ordinance's permit revocation provisions should be declared void due to a lack of adequate procedural safeguards and should be declared void to the extent that they allow permits to be revoked based on mere arrests, rather than convictions.[95] Plaintiffs also contend that, as a procedural matter, it was improper for the Court to grant summary judgment for the City on these issues because the City did not identify these issues in its Motion for Summary Judgment. *See* FTU Plaintiffs' Motion for Reconsideration [Doc. # 381], at 26-35.[96]

Contrary to Plaintiffs' contention, however, the Court's Summary Judgment Opinion did not address the Ordinance's provisions regarding revocation of entertainer and manager permits. This issue could not have been properly addressed because no party has even claimed that this issue is ripe for adjudication. No entertainers or managers have yet presented the Court with any evidence that the City has tried to *revoke* their permits. In light of the Supreme Court's strict holding regarding standing in

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[95] The City denies that the Ordinance allows revocations on this basis. *See* City's Response to FTU Plaintiffs' Motion for Reconsideration [Doc. # 413], at 8-9.

[96] At least with respect to procedural safeguards, Plaintiffs are mistaken. The City specifically argued in its original summary judgment motion that the safeguards for permit revocations are adequate. *See* City's Motion for Summary Judgment [Doc. # 120], at 41 n. 16.

FW/PBS for individuals who attempt to challenge criminal record criteria in adult entertainment permit requirements, *see* 493 U.S. at 234, 110 S.Ct. 596; Sum. Jmt. Opinion, at 847-48 n. 196, the Court cannot and does not reach these issues at this time with respect to permit revocations. *Cf. Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (court cannot consider merits of an issue until standing is shown).[97]

E. *"As Applied" Challenges*

1. Videotaping of Application Process

In their earlier briefing, Plaintiffs objected to the City's practice of videotaping individuals applying for entertainer and manager permits but did not specifically seek relief on this issue. In its prior Summary Judgment Opinion, the Court noted concern about the possible chilling impact of the videotaping but did not expressly order the City to cease the videotaping. *See* Sum Jmt. Opinion, at 848 ("The Ordinance itself does not authorize the Houston Police Department to make these videotapes,

[97] The FTU Plaintiffs also claim that the Ordinance's revocation provisions are facially unconstitutional because they do not allow for a stay of revocation pending full judicial review of the administrative revocation decision but instead only allow for a 30-day stay under § 28-257. *See* FTU Plaintiffs' Motion for Reconsideration [Doc. # 381], at 44-45. Although Plaintiffs concede that this 30-day provision meets the constitutional requirements articulated by the Fifth Circuit in *TK's Video,* Plaintiffs nevertheless seek a ruling from the Court on this issue so that they may urge the Fifth Circuit to reconsider this holding. While the Court, at first blush, sees no constitutional deficiency in the amount of time provided for a stay under § 28-257, it cannot rule on the question since no Plaintiff yet has standing to challenge this provision.

and nothing in the legislative record for the Ordinance suggests a justification for such action. The Court therefore seriously questions the City's decision to make these videotapes.").

Plaintiffs now request the Court to enter a formal order requiring the City to stop videotaping permit applicants and to destroy all such videotapes made to date.[98] The parties have submitted supplemental briefing on this issue. *See* FTU Plaintiffs Supplemental Brief on Videotaping [Doc. # 446]; City of Houston's Brief in Opposition to FTU Plaintiffs' Assertions of Unconstitutionality of Videotaping [Doc. # 453].

After considering the parties' arguments and affidavits on this issue,[99] the Court concludes that the City's videotaping practice is not unconstitutional under the circumstances presented. Because of the currently highly contentious climate surrounding this litigation, the Court concludes that the City's videotaping of the permit application process is a permissible, content-neutral exercise of administrative prerogative.

Plaintiffs argue that the City's practice of videotaping permit applicants is unconstitutional because of the

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[98] The FTU Plaintiffs' have amended their Complaint to include an express cause of action challenging the videotaping. *See* FTU Plaintiffs' Corrected Motion for Leave to File Third Amended Complaint [Doc. # 443], at 12, and ruling *infra* in Section X.

[99] In addition, at the conference held on April 7, 1998, the Court received oral testimony from Captain Roy B. Chandler regarding the mechanics of the City's videotaping of the permit application process and, in the presence of counsel after the conference, viewed a portion of one original recent videotape. The City is directed to submit under seal a copy of the video tape viewed by the Court and counsel so that the record on this issue will be complete.

chilling effect it may have on many individuals. In support of this claim, Plaintiffs have called the Court's attention to several affidavits submitted by entertainers in support of Plaintiffs' earlier requests for temporary restraining orders.[100] The City argues that these individuals do not have standing to raise this complaint because they all obtained permits and thus were not chilled by the videotaping. The Court concludes that Plaintiffs have standing to argue this issue.[101] In cases involving restraints on speech, the law allows individuals to raise constitutional challenges on behalf of others with whom they have some pertinent relationship and who, as a practical matter, would not be likely to raise the challenge themselves. As the Court explained in its Summary Judgment Opinion,

> "[A]n exception from traditional rules of standing to raise constitutional issues has reflected the Court's judgment that the very existence of some statutes may cause persons not before the Court to refrain from engaging in constitutionally protected speech or expression. The exception is justified by the overriding importance of maintaining a free and open market for the interchange of ideas."

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[100] *See* Declarations of Ann Marie Hasselbach [Doc. # 33], ¶ 10; Andrea Allbright Marco [Doc. # 35], ¶ 12; Kimberly Ann Dushman [Doc. # 40], ¶ 9; Heather Weldin [Doc. # 42], ¶ 7; and Naomi L. Parrish [Doc. # 44], ¶ 9.

[101] Although Plaintiffs have not submitted affidavits from individuals who have actually been chilled by the videotaping, they argue that this is because such individuals do not want to make their identities as erotic entertainers known by becoming involved in litigation, even if they have the opportunity to submit affidavits anonymously or under seal.

Sum. Jmt. Opinion, at 788 (quoting *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 60, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976)).[102]

The City argues that it is videotaping the permit application process with a surveillance camera in order to protect itself and its employees from charges of abuse or harassment by permit applicants. In support of this argument, the City has submitted two affidavits in which police officers attest to their fears of unfounded accusations. One officer avers that: "I feel that the permitting process needs to be videotaped to protect me against unfounded allegations and to document the verbal abuse directed at the officers and the outright rudeness of some applicants." Affidavit of Stefanie G. Leonard, Exhibit B to City's Brief in Opposition to FTU Plaintiffs' Assertions of Unconstitutionality of Videotaping [Doc. # 453], ¶ 3. The other states that:

> In order to protect the officers who are required to interface with the applicants against unfounded allegations and to document the verbal abuse directed at my officers and the outright rudeness of some applicants, I have permitted the officers to videotape the permitting process to protect their integrity and the integrity of the permitting process.

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[102] The Court also noted that "opponents who challenge an ordinance on the basis of the first amendment are 'entitled to rely on the impact of the ordinance on the expressive activities of others as well as their own.'" Sum. Jmt Opinion, at 788 (quoting *SDJ*, 636 F.Supp. at 1365 n. 2; *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981)).

Affidavit of Roy B. Chandler, Exhibit C to City's Brief, ¶ 4.[103]

The City claims that its officers' fears of unfounded accusations is very real in light of Plaintiffs' contentions that city officials "threaten and bully the applicants," *see* A.H.D.'s Motion to Compel [Doc. # 412], at 4, and that conditions at the permitting area are "very scary," *see* Declaration of Robert G. Furey [Doc. # 419]. Moreover, the City contends that, because video surveillance cameras are common in our society today, Plaintiffs' claim that the videotaping of applicants would have any real chilling effect on potential applicants is disingenuous. The City requests that the Court take judicial notice of the pervasiveness of video surveillance cameras in such places as banks, convenience stores, and government offices.

In response to a request by the Court, the City has also submitted evidence regarding other City permit processes that are recorded on videotape.[104] This evidence

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[103] For some reason which the Court is at a loss to understand, Plaintiffs – or at least their counsel – appear to believe that the City's defense of its videotaping of the permit application process is that the City wants to protect itself from allegations of "sexual harassment." Plaintiffs argue that such a defense is not viable because women apply for other types of municipal permits, in addition to adult entertainment permits, and because the City could use female police officers to process permit applications. These arguments are entirely irrelevant to the issue presented here. As far as this Court is aware, no applicants have brought forth any allegations of sexual harassment. *See also Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998) (holding that sexual harassment is not limited to men harassing women).

[104] The Court did not invite this comparison in order to evaluate Plaintiffs' Equal Protection Clause arguments against the videotaping. As discussed *supra* in Section III.D.2, the Court is not persuaded that Plaintiffs can succeed on this constitutional basis in any of their attacks

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indicates that video cameras are used in the City office where individuals apply for building permits, in the Municipal Courts Building where individuals post bonds, at the airport, and at the Houston Police Department building where individuals apply for city permits for burglar alarms and auto dealer licenses. *See* Exhibits E-H to City's Brief in Opposition to FTU Plaintiffs' Assertions of Unconstitutionality of Videotaping [Doc. # 453]. The City's evidence shows, however, that, in none of these other examples, does the City directly aim video cameras on individuals applying for permits to engage in a controversial form of expression of a sensitive nature, nor does the City make a video recording of every individual who performs a specific activity. In these examples, the video cameras are set up to monitor activities within their buildings in general, and it would not be possible to ascertain from the resulting videotapes alone what purpose an individual had for being in the building.[105]

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on the Ordinance. Instead, the Court requested that the City submit evidence regarding other city permit processes that are videotaped in order to evaluate the City's defense that video surveillance is common in this type of situation and that therefore the City's decision to videotape applicants is not content-based.

[105] The evidence regarding video surveillance of the City office that administers building permits indicates that video cameras are located in the stairwells of the building and in the building permit office itself but that only "*some* of the permit desks are covered" by the video cameras. Affidavit of Don Thompson, Exhibit E to City's Brief in Opposition to FTU Plaintiffs' Assertions of Unconstitutionality of Videotaping ("City's Videotaping Brief") [Doc. # 453] (emphasis added). The video camera at the Municipal Courts Building is located at the entrance of the building and thus does not record the purpose for which individuals enter the building. *See* Affidavit of A.O. Hernandez, Exhibit F to City's Videotaping Brief. Likewise, according to the City's evidence, although there are video monitors at the airport, these monitors are located "in various areas" of the facility and therefore do not single out

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In contrast, the video camera at the sexually oriented business permit office is situated in plain view in a corner of a large room where individuals apply for entertainer and manager permits and is directed specifically at the desks at which individuals complete the application forms with City officials. The camera films the applicants from the front while they approach the desks from the waiting area approximately twenty to thirty feet away and then films the applicants' backs at about a ten to fifteen foot distance while they complete the paperwork with City officials. The videotape also shows the waiting area in the background. The camera does not record the actual information individuals submit on their permit applications or the faces of the applicants while they are meeting with the City officials.

Plaintiffs argue that a number of potential applicants will be deterred from applying for permits, and thus from engaging in protected activity, for fear of having these videotapes in the hands of government officials. In support of their challenge to the entire permit requirement, Plaintiffs argue that many entertainers and managers would not want to have personal information about themselves in City records which identify them as working in

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individuals engaging in any one specific activity. Affidavit of Jerry Crenshaw, Exhibit G to City's Brief. Moreover, according to this affidavit, not all of the video monitors at the airport are even equipped for video *recording*, as opposed to mere monitoring. Finally, the City's evidence establishes that the video cameras at the Houston Police Department building are located at the entrance to the building and therefore do not record the purpose for which individuals enter the building. *See* Affidavit of D.L. Smith, Exhibit H to City's Brief. Although this affidavit indicates that there are at least two types of licenses which individuals can obtain at the Police Department building, there ar clearly many other purposes for which people enter this building.

sexually oriented businesses. Although the Court has concluded, under the authority of *TK's Video,* that the permit requirement is valid in general, the Court nevertheless has recognized the serious nature of Plaintiffs' concerns regarding their privacy and has therefore declared permit application information to be confidential and not subject to disclosure under the Texas Public Information Act. *See* Sum. Jmt. Opinion, Section V.G.4. The Court also enjoined the City from requiring applicants to submit more information than is expressly required by the Ordinance and is needed by the City in order to conduct the criminal background checks. *See id.* Section V.G.3.[106]

After consideration of Plaintiff's arguments against the videotaping and the City's justifications for it, as well as the method of recording, the Court upholds the City's practice of videotaping permit applicants. The Court has reached this decision in part because § 28-254(a)(4) of the Ordinance validly requires entertainers and managers to submit photographs of themselves. In this circumstance, videotapes of the application process, taken from at least a ten foot distance, are no more revealing than the applicants' photographs. In fact, the City's videotapes contain

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[106] In support of this holding, the Court cited the Fifth Circuit's statement in *TK's Video* that:

> "Compelled content-neutral disclosure of owner and employee information can chill protected expression . . . [w]e insist that countervailing state interests must further a substantial government interest. This protective skirt requires a 'relevant correlation' or 'substantial relation' between the information required and the government interest."

Sum. Jmt. Opinion, at 840 (quoting *TK's Video,* 24 F.3d at 709-10).

less information than the entertainers and managers' application files, all of which include applicants' close-up photographs. Moreover, the City's stated interest in videotaping the application process so as to protect itself and its employees from possible allegations of abuse or harassment is substantial enough, under the requirements of *TK's Video,* 24 F.3d at 709-10, to outweigh Plaintiffs' concerns that individuals who may want to engage in protected First Amendment activity will be chilled by this practice. While videotaping is not the only way the City can defend itself against unfounded charges of abuse, it is an inexpensive method of ensuring an accurate and unbiased record of the application process and may allow the City to avoid unfounded accusations waged against its officers.

Thus, the Court holds, under the facts presented here, that the City's videotaping of the permit application process is not an unconstitutional imposition on Plaintiffs' right to engage in expressive activity.

The Court expresses, however, the following caveat. Because videotaping is relatively intrusive and it is possible that it may have some incidental chilling effect on expressive activity,[107] the Court can conceive of no reason

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[107] The City asserts that Plaintiffs' claim that "individuals who regularly expose themselves in a state of nudity or near-nudity to total strangers on a daily basis" would be chilled by the City's videotaping of the permit office is frivolous. City's Brief in Opposition to FTU Plaintiffs' Assertions of Unconstitutionality of Videotaping [Doc. # 453], at 8. As noted in its Summary Judgment Opinion, the Court believes that this argument belittles the genuine concern of entertainers, who have not sacrificed their First Amendment rights merely because they have chosen to appear undressed anonymously in public. *See* Sum. Jmt. Opinion, at 842-43. According to Plaintiffs, many of the individuals currently working in sexually oriented businesses intend to pursue

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why the tapes should not be erased or destroyed after two years, which would be the statute of limitations for an applicant to bring a § 1983 or tort claim alleging abuse by an officer during the application process. *See Burns v. Harris County Bail Bond Board,* 139 F.3d 513, 518 (5th Cir.1998). The City's stated interest in having these videotapes would not extend beyond this period of time.

2. Permissibility of Bringing Young Children into Application Room

In their earlier briefing, the FTU Plaintiffs complained that an applicant for an entertainer permit was not permitted to bring her young child with her into the room in the permit application room. In its Summary Judgment Opinion, the Court noted this concern but stated that it was not persuaded that this issue rose to the magnitude of a constitutional violation. *See* Sum. Jmt. Opinion, at 848. The FTU Plaintiffs now seek an express

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other careers at a later time in their lives and worry about City officials having such revealing documentation of their involvement in this business, which could, in unforeseen ways, come back to haunt them later in their careers. Although the City asserts that it has taken measures to keep these videotapes confidential along with the rest of the permit application information, Plaintiffs contend that they have no guarantee that the videotapes could not, at some point, fall into the wrong hands and be used to cause them embarrassment or harm. Moreover, Plaintiffs have raised a serious argument that entertainers and managers may have genuine concern about *government* officials obtaining more information about them than is authorized by legislative mandate. In *TK's Video,* the Fifth Circuit acknowledged the possible chilling effect that can result from the government's collection of personal information about individuals engaging in protected activity and therefore required that the government have a solid justification for its collection of all personal information regarding these individuals. *See* 24 F.3d at 709-10; Sum. Jmt. Opinion, at 842-43.

determination regarding the constitutionality of this practice. *See* FTU Plaintiffs' Motion for Reconsideration [Doc. # 381], at 47-48. However, the City indicates that, since hearing of Plaintiffs' complaints, it has altered its policy and is now allowing permit applicants to bring children with them into the application room. *See* City's Response to FTU Plaintiffs' Motion for Reconsideration [Doc. # 413], at 10. The FTU Plaintiffs' request for an injunction on this issue is therefore moot, and the Court declines to reach the issue on the merits.

F. *Conspicuous Display Requirement*

In its Summary Judgment Opinion, the Court held that, as applied to entertainers, the Ordinance's requirement that individuals working in adult businesses must conspicuously wear identification cards while performing is an impermissible content-based restriction on speech. *See* Sum. Jmt. Opinion, Section V.G.7. The Court did not address the validity of the conspicuous display requirement as applied to managers because it did not appear that Plaintiffs had addressed this point in their summary judgment briefing. *See* Sum. Jmt. Opinion, at 850.[108]

[108] Plaintiffs claim that they did argue this point in their summary judgment briefing. On reexamination of the FTU Plaintiffs' summary judgment response, the Court agrees that there was passing mention of the fact that Plaintiffs were challenging the conspicuous display requirement with respect to both entertainers and managers. However, Plaintiffs' substantive arguments were limited to the chilling impact the requirement would have on entertainers. *See* FTU Plaintiffs' Response to City's Motion for Summary Judgment [Doc. # 170], at 68-75.

In their reconsideration motions, the City requests that the Court reconsider its holding invalidating the requirement as applied to entertainers, and the FTU Plaintiffs request that the Court reach this issue, and invalidate the requirement, with respect to managers. *See* City's Motion for Reconsideration [Doc. # 364], at 19-20; FTU Plaintiffs' Motion for Reconsideration [Doc. # 381], at 42-43. After further consideration of the legislative record and the parties' arguments, the Court withdraws its previous ruling invalidating the conspicuous display requirement with respect to entertainers and now holds that the requirement is constitutional as applied both to entertainers and to managers.

In its request for reconsideration on this issue, the City cites evidence from the legislative record that it claims supports the content-neutrality of the conspicuous display requirement. *See* City's Motion for Summary Judgment [Doc. # 120], Exhibit 7G, at 17-18; Exhibit 9D, at 29-30; Exhibit 36, at 12, 15-16.[109] After further examination of this evidence and other portions of the legislative record,[110] the Court now concludes that City Council

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[109] The City also argues that the Court previously erred in stating that it is not clear whether the conspicuous display requirement was challenged before the Fifth Circuit in *TK's Video*. *See* Sum. Jmt. Opinion, at 848-49. In support of this argument, the City notes that the district court specifically upheld the conspicuous display requirement. *See TK's Video, Inc. v. Denton County, Tex.*, 830 F.Supp. 335, 344 (E.D.Tex.1993), *aff'd in part*, 24 F.3d 705. This citation does not, however, contradict this Court's statement that the *Fifth Circuit* did not address this issue. In fact, the Court has recently reviewed the briefs submitted to the Fifth Circuit in *TK's Video* and has ascertained that this issue was not even raised in the appeal.

[110] *See, e.g.*, Minutes for August 8, 1996, Committee Meeting, Exhibit 6D to City's Motion [Doc. # 120], at 10; Exhibit 7G, at 33, 43, 134-35, 143; Exhibit 8E, at 97-99.

members did not act with content-based intent when they decided to require individuals working in adult businesses to wear identification cards while working. Instead, the Council adopted this requirement with the content-neutral purpose of ensuring that in fact all entertainers and managers working in adult businesses are properly licensed and that the licensure of all employees can be easily ascertained without interruption of the entertainment by and business of Plaintiffs.

It is clear from the Committee's discussions and testimony of police officials that an important goal of the new Ordinance was to allow police officers to enforce the law in adult businesses from a distance, without having to get themselves involved in illegal activity.[111] By requiring that individuals who must have licenses to work in adult businesses conspicuously display their licenses while working, the City sought to allow officers to enforce the licensing requirement upon entering a business and looking around at the entertainers and managers working there.[112] With the conspicuous display requirement in force, police officers would be able to ascertain whether individuals are properly licensed without provoking direct immediate confrontations with them.[113]

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[111] *See* Transcript of August 19, 1996, Committee Meeting, Exhibit 7G to City's Motion for Summary Judgment [Doc. # 120], at 143 (Captain Chandler explains that "what we're looking for is the ability for an undercover officer to walk in and look around to see if this club is engaging in illegal activity in a very short period of time").

[112] *See id.* at 43 (identification cards should be "readable in the environment").

[113] *See id.* at 33 (Harris County Assistant District Attorney explains that conspicuous display requirement "does away with the . . . problem [of] the unknown dancer, when the officer doesn't want to make the

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In making this ruling, the Court specifically relies on indications in the record that the City has taken measures to make the conspicuous display requirement narrowly tailored. The identification cards that entertainers and managers are required to wear do not contain the licensee's real name or other identifying information that could increase the licensee's risk of being subject to harassment or other dangers, such as stalking. Instead, each card contains only the licensee's picture, a stage name, and an identification number.[114] This information is sufficient to allow police officers to ascertain without intrusion whether all entertainers and managers working in adult businesses are licensed but is not so broad as to create any real danger for the licensees.[115]

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arrest at the time they observe the incident"), 134-35 (officers often want to come back and make arrests at a later time).

[114] *See* Exhibit 3 to City's Motion for Reconsideration [Doc. # 364]; Transcript of September 16, 1996, Committee Meeting, Exhibit 9D to City's Motion for Summary Judgment, at 29-30 (Captain Chandler explains that "to protect the dancers, they would have to wear on them . . . a license that does not have their name on it. It has some kind of number and a picture. That allows a citizen who is offended to complain on them by number and stage name, but it protects them from stalkers").

[115] In its original invalidation of the conspicuous display requirement, the Court noted that the requirement would constitute some intrusion on the entertainers' engagement in expressive activity. The Court now concludes that the intrusion, if any, is not substantial enough to override the City's power to implement a content-neutral regulation that will assist its officers in performing their law enforcement duties.

In addition, the Court notes that the conspicuous display requirement intrudes even less on managers' speech than on entertainers' speech because managers are not subject to as severe a threat of harassment from patrons as are entertainers, who put themselves on display before patrons in a state of undress.

Thus, the Court concludes that the conspicuous display requirement is a permissible content-neutral regulation that is narrowly tailored to serve the City's substantial interest in ensuring that only licensed entertainers and managers work in adult businesses. The Court holds that the requirement is constitutionally valid as applied to both entertainers and managers.[116]

IX. *CLASSIFICATION OF ADULT MOVIE THEATRES SEATING LESS THAN 100 PATRONS*

In their Motions for Reconsideration, the N.W. Enterprises and Elgin Investment Company Plaintiffs request that the Court resolve a potential ambiguity in the Ordinance's definitions of adult movie theatres and adult mini-theatres. *See* N.W. Plaintiffs' Motion for Reconsideration [Doc. # 343], at 6-8; Elgin Investment Co.'s Motion for Reconsideration [Doc. # 367]. Specifically, these Plaintiffs argue that conventional adult movie theatres that have a seating capacity of fewer than 100 patrons should be considered, under the Ordinance, to be adult movie theatres and not adult mini-theatres.[117] In contrast, the City argues that such theatres are classified under the Ordinance as both adult movie theatres *and* adult mini-theatres.[118]

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[116] The entertainers may decide where and how to display the identification cards, which may be on an arm or ankle, as suggested by the City's counsel at a pretrial conference.

[117] To the extent that these Plaintiffs request that the Court "reconsider" its holding with respect to these definitions, Plaintiffs' request is not correctly stated. The Summary Judgment Opinion did not purport to clarify these definitions, as this issue was not even presented to the Court prior to that time.

[118] Thus, both sides agree that conventional adult movie theatres that have a seating capacity of fewer than 100 patrons should be

(Continued on following page)

considered to be adult movie theatres under the Ordinance. Section 28-121 defines an "adult movie theatre" as:

> An establishment, containing a room with tiers or rows of seats facing a screen, or projection area, whose primary business is the exhibition to customers of motion pictures which are intended to provide sexual stimulation or sexual gratification to such customers and which are distinguished by or characterized by an emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas.

The City believes that such theatres should be [sic] also be classified as adult mini-theatres. Section 28-81 defines an "adult mini-theatre" as follows:

> Adult mini-theatre shall mean any premises that is subject to regulation under Chapter 243 of the Local Government Code as amended, to which members of the public or members of any club, group or association are admitted and permitted to use one or more 'mini theatre devices.'

Section 28-81 defines a "mini-theatre device" as follows:

> Mini-theatre device shall mean any coin or slug-operated or electrically or electronically or mechanically controlled machine or device that dispenses or effectuates the dispensing of 'entertainment,' that is intended for the viewing of more than five (5) persons but less than 100 persons in exchange for any payment of any consideration. The term 'mini-theatre device' shall not include any conventional motion picture screen or projection area designed to be viewed in a room containing tiers or rows of seats with a viewer seating capacity of 100 or more persons.

Plaintiffs argue that, no matter how many seats a theatre holds, a conventional movie theatre is not a mini-theatre because a conventional movie theatre projector is not a mini-theatre device as specifically defined in § 28-81. Further, Plaintiffs argue that a conventional movie theatre cannot be a mini-theatre because, under the definition of a "mini-theatre," patrons do not "use" a conventional movie theatre projector as they would use an adult mini-theatre device. By this, Plaintiffs mean that, in a conventional movie theatre, patrons do not control the projector as they would in a mini-theatre.

The City argues, however, that under the Ordinance's definitions, a conventional movie theatre projector can also be a mini-theatre device

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It appears that Plaintiffs are concerned about this potential ambiguity because if any of their businesses are classified as both adult movie theatres *and* adult mini-theatres, then they will be required to obtain licenses to operate under Article II of the Ordinance (the article that applies to adult arcades and mini-theatres) as well as licenses under Article III (the article that applies to all adult businesses). However, these Plaintiffs do not explain why they oppose obtaining Article II licenses in addition to Article III licenses. They do not specify which, if any, provisions of Article II they find objectionable and why. They also do not explain what else is at stake with respect to this issue, what impact this statutory interpretation will have on them, how this controversy is ripe, and even why this Court has jurisdiction to make this determination.[119]

Thus, the Court concludes that this matter is not ripe for resolution. The controversy simply is not framed specifically enough to permit the Court's intervention. A ruling on this issue must therefore await the City's enforcement of the

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because such a projector, although not coin or slug-operated, is nevertheless an electrically controlled machine. The City also argues that the term "use" in the Ordinance's definition of an "adult mini-theatre" does not require that patrons actually control the machine but also applies to patrons watching a film showed by a projectionist who is an employee of the theatre. Furthermore, the City argues that the disputed theatres are clearly mini-theatres under the Ordinance's definition because the last sentence of the definition of an adult mini-theatre device would be superfluous if *no* conventional motion picture screen or projection area were to be considered a mini-theatre, no matter how many seats it was intended to hold.

[119] In contrast, Plaintiff Ice Embassy persuaded the Court that a decision is necessary with respect to the Ordinance's application to large VIP rooms because an adverse decision would cause it to abandon its plans to build its proposed VIP room.

Article II license requirement against these Plaintiffs and more particularized arguments, most likely in defense to a state court criminal prosecution.[120]

X. *FTU PLAINTIFFS' MOTION FOR LEAVE TO FILE THIRD AMENDED COMPLAINT*

On April 13, 1998, the FTU Plaintiffs attempted to file a Third Amended Complaint. *See* FTU Plaintiffs' Corrected Motion for Leave to File Third Amended Complaint [Doc. ¶ 443].[121] This Complaint would add HFR Enterprises, the landlord for Plaintiff Ice Embassy, as a Plaintiff in this case; incorporate Ice Embassy's supplemental complaint regarding its proposed VIP room; add a cause of action regarding the City's elimination of grandfathered status for Plaintiffs with respect to after-arriving protected land uses; and add a cause of action challenging the City's videotaping of entertainers and managers applying for permits. The City has filed an Objection [Doc. # 455] to this Motion, and the FTU Plaintiffs have filed a Reply [Doc. # 462].

Because the FTU Plaintiffs' Third Amended Complaint raises no surprises and will cause no prejudice for

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[120] Plaintiffs appear to try to put this issue into the form of a constitutional argument by contending that the legislative record for Ordinance 97-75 does not contain any evidence that conventional adult movie theatres seating less than 100 patrons create the same sorts of negative secondary effects as adult arcades. However, Plaintiffs have failed to raise a constitutional issue because they do not even specify what requirements of Article II they believe should not apply to conventional adult movie theatres that seat fewer than 100 patrons.

[121] This Motion superseded an earlier Motion for Leave to File Third Amended Complaint [Doc. # 433], which is **DENIED AS MOOT** in light of Plaintiffs' corrected Motion.

the City, the Court grants leave to amend. Pursuant to Fed.R.Civ.P. 15(a), "leave [to amend] shall be freely given when justice so requires." *See Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962); *Lowrey v. Texas A & M University System*, 117 F.3d 242, 245-46 (5th Cir.1997). In addition, the Court addresses the City's specific objections below.

First, the City objects to the addition of HFR Enterprises as a Plaintiff in this case on the ground that this intervention is untimely. The City argues that HFR Enterprises should not be allowed to join the lawsuit now because it has been aware since last year that it had an interest in this litigation but failed to intervene sooner. However, the City does not indicate how it will be prejudiced by the addition of this Plaintiff to the case. The Court therefore will allow HFR Enterprises to join the litigation so long as it agrees to be bound by the Court's prior scheduling orders and rulings. See Sum.Jmt. Opinion, at 769 n. 12 (allowing late intervention by Plaintiff KQ Investments under similar conditions).

Second, the City objects to the FTU Plaintiffs' attempt to amend their Complaint to incorporate the VIP room issue on the ground that this cause of action is already included in Ice Embassy's earlier supplemental complaint and is therefore unnecessary and duplicative. The City does not explain, however, how it would be unfairly prejudiced by this amendment and the Court can conceive of none. This amendment is allowed.

Third, the City objects to the FTU Plaintiffs' attempt to add a claim regarding the City's elimination of grandfathered status for preexisting adult businesses with respect to after-arriving protected land uses on the ground

that the FTU Plaintiffs do not have standing to assert this claim. The City contends that this claim is not ripe because the City may still appeal the Court's invalidation of the Ordinance's increased distance requirements and because an appellate reversal would moot Plaintiffs' claim regarding the elimination of a business's grandfathered status. The Court rejected this argument *supra* in Section III.E. and held that these Plaintiffs do have standing to raise issues that were created by the Court's rulings in its Summary Judgment Opinion. In any event, even if the Court is in error about the ripeness of these claims, lack of ripeness does not preclude Plaintiffs from adding them to their Complaint, so that the matters may be raised at a later time if and when they become ripe.

Fourth, the City objects to Plaintiffs' attempt to add a cause of action challenging the City's videotaping of entertainers and managers applying for permits on the ground that Plaintiffs lack standing to raise this issue. For reasons discussed *supra* in Section VIII.E.1, the Court rejects this argument.

Finally, the City argues that the FTU Plaintiffs' Third Amended Complaint is untimely and would result in undue delay to the proceedings. The Court disagrees. This amendment will not cause any delay, since the Court, in this Opinion, has already addressed the issues included in the Complaint. Moreover, the Court concludes that addressing all of Plaintiffs' arguments in the current litigation will reduce delay in the long run and will promote judicial efficiency by obviating the need for separate lawsuits on issues closely related to those already raised here. Therefore, the Court concludes that justice requires that Plaintiffs' Motion for Leave to File a Third Amended Complaint be granted.

XI. *ATTORNEYS' FEES*

Finally, the N.W. Enterprises Plaintiffs claim that Plaintiffs' partial success in this case entitles them to attorneys' fees, and they request guidance as to how to submit their application for fees. The Court declines to address attorneys' fees issues until the case has been concluded before this Court and judgment has been entered.

XII. *CONCLUSION*

For the foregoing reasons, it is

ORDERED that the Court's Memorandum Opinion and Order ("Summary Judgment Opinion") [Doc. # 331] is **REAFFIRMED** except in the following respects:

1. The Court withdraws its conclusion that the addition of public parks to the Ordinance's list of protected land uses is constitutional. A ruling on the validity of this amendment, contained in § 28-125(b)(1) of the Ordinance, must await further factual development of the issue regarding the number of permissible sites that would exist for adult businesses if this amendment were implemented.[122]

2. The Court withdraws its ruling that invalidated § 28-256(a) of the Ordinance, the requirement that entertainers in adult establishments must wear identification cards while working.

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[122] *See* discussion *supra* Section III.B.2.

The Court now upholds this requirement for both entertainers and managers.[123]

3. The Court withdraws its ruling that any entertainer or manager who was working in an adult business prior to the time that the individual permit requirement went into effect, who applied for a permit by the application deadline, and whose application was denied, must be allowed to continue working pending the completion of the entire judicial appeal of the applicant's permit denial. The Court now holds instead that such individual must only be allowed to continue working for thirty days following the denial of the permit, unless the individual receives a state court injunction enjoining the City's enforcement of the permit requirement pending judicial review.[124]

It is further

ORDERED that a ruling on the validity of the new multifamily dwelling formula, contained in § 28-125(b)(3) of the Ordinance, must await further factual development of the issue regarding the number of permissible sites that would exist for adult businesses if this formula were implemented.[125] The Dee & Dee Plaintiffs' Motion for Partial Summary Judgment regarding the multifamily dwelling formula [Doc. # 377] is therefore **DENIED**. It is further

ORDERED that the City cannot constitutionally apply the Ordinance's prohibition against providing adult

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[123] *See* discussion *supra* Section VIII.F.

[124] *See* discussion *supra* Section VIII.A.2.

[125] *See* discussion *supra* Section III.C.2.

entertainment in enclosed areas, contained in §§ 28-136(b) and 28-258(c) of the Ordinance, to Plaintiff Ice Embassy's large VIP room.[126] Ice Embassy's Motion for Partial Summary Judgment on this issue [Doc. # 258] is therefore **GRANTED**. It is further

ORDERED that the City may not enforce § 28-130(g) of the Ordinance without providing the affected businesses with the procedural protections and compensation required by § 216.001 *et seq.* of the Texas Local Government Code.[127] The City's Motion for Summary Judgment on Ordinance 97-75, Article III, Section 28-130(g) [Doc. # 397] is therefore **DENIED** and the FTU Plaintiffs' Cross-Motion for Summary Judgment on § 28-130(g) [Doc. # 435] is **GRANTED**. It is further

ORDERED that the City may not at this time reject a timely filed application for an adult business license under Ordinance 97-75 on the sole ground that the applicant is located within 750 feet of a school, church, or daycare center that arrived after the establishment of the adult business at that location.[128] It is further

ORDERED that the parties' Motions for Reconsideration [Docs. # 343, 364, 367, 370, 376, 381, 388] are **GRANTED IN PART** and **DENIED IN PART** in accordance with this Supplemental Memorandum Opinion and Order. It is further

ORDERED that the A.H.D. Plaintiffs' Motion to Join the FTU Plaintiffs' Response to Defendant's Memorandum

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[126] *See* discussion *supra* Section VI.C.

[127] *See* discussion *supra* Section VII.B.

[128] *See* discussion *supra* Section III.E.

regarding the multifamily dwelling formula [Doc. # 380] is **GRANTED**. It is further

ORDERED that the Dee & Dee Plaintiffs' Motion for Leave to File Corrected Motion for Reconsideration [Doc. # 374] is **GRANTED**.[129] The Dee & Dee Plaintiffs' Corrected Motion for Reconsideration [Doc. # 376] supersedes their earlier Motions [Docs. # 369 and 375]. The earlier Motions [Docs. # 369 and 375] are therefore **DENIED**. It is further

ORDERED that the Dee & Dee Plaintiffs' Objection to N.W. Enterprises, Inc., Memorandum of Law Regarding Multi-Family Dwelling Formula [Doc. # 378] is **OVERRULED**.[130] It is further

ORDERED that the FTU Plaintiffs' Objections to Summary Judgment Affidavits of Ollie Schiller [Docs. # 438 and 461] are **OVERRULED**.[131] It is further

ORDERED that the FTU Plaintiffs' Corrected Motion for Leave to File Third Amended Complaint [Doc. # 443] is **GRANTED**.[132] The FTU Plaintiffs' Motion for Leave to File Third Amended Complaint [Doc. # 433] is **DENIED AS MOOT**. It is further

ORDERED that the City's Motion to Dissolve Emergency Order Extending the Entertainer/Manager Licensing Deadline [Doc. # 451] is **DENIED**.[133] It is further

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[129] *See* discussion *supra* note 10.

[130] *See* discussion *supra* note 44.

[131] *See* discussion *supra* note 82.

[132] *See* discussion *supra* Section X.

[133] *See* discussion *supra* Section VIII.A.1.

ORDERED that the N.W. Enterprises' Plaintiffs Motion to adopt FTU Plaintiffs' briefing on videotaping [Doc. # 454] is **GRANTED**. It is further

ORDERED that the City's Objections to Plaintiffs' Evidence on the signage issue [Doc. # 457] are **OVERRULED**.[134] It is further

ORDERED that the City's Objections to Declarations of Raschid Chawdhary and Affidavit of David A. Furlow [Doc. # 468] are **OVERRULED**.[135] It is further

ORDERED that the City shall submit under seal a copy of the videotape of the permit application process that the Court and counsel viewed after the conference held on April 7, 1998.[136] It is further

ORDERED that the parties are directed to submit a joint proposal (no more than five pages in length) on or before June 22, 1998, for a discovery schedule and trial procedures on the issue of alternative sites under the Ordinance's amendments regarding multifamily dwellings and public parks. The parties should follow (where applicable) the format for a Joint Discovery/Case Management Plan used in this district pursuant to Fed.R.Civ.P. 16 and 26(f). In this submission, the parties also shall state whether they seek to litigate this issue prior to completion of their appeals on the other locational issues.[137]

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[134] *See* discussion *supra* note 86.

[135] *See* discussion *supra* note 82.

[136] *See* discussion *supra* note 99.

[137] *See* discussion *supra* at 46. **THIS IS NOT A FINAL JUDGMENT.**

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

N.W. ENTERPRISES, INC., et al.,	§	
Plaintiffs,	§	
	§	CIVIL ACTION NO.
v.	§	H-97-0196
	§	
THE CITY OF HOUSTON,	§	
Defendant.	§	

MEMORANDUM OPINION AND ORDER REGARDING CONSPICUOUS DISPLAY REQUIREMENT

(Filed Aug. 3, 1998)

I. *INTRODUCTION*

This Opinion addresses the constitutionality of § 28-256(a) of Ordinance 97-75, the provision of Houston's new sexually oriented business ordinance that requires entertainers and managers at these businesses to wear their licenses while working. In its Summary Judgment Opinion, the Court held that this provision was unconstitutional as applied to entertainers and determined that it did not need to address the issue with respect to managers. *See* Amended Memorandum Opinion and Order [Doc. # 472], at 187-91. In its Reconsideration Opinion, the Court reversed itself and held the provision to be constitutional as applied to entertainers and extended this holding to managers as well. *See* Supplemental Memorandum Opinion and Order [Doc. # 474], at 107-10.

Plaintiffs, seeking a ruling that the provision is unconstitutional as applied both to entertainers and to managers, have now submitted extensive briefing on this issue and have requested that the Court reconsider the matter once again. *See* Motion to Amend [Doc. 487]. The City has filed a brief opposing this request. *See* Response [Doc. # 497]. For the reasons described below, the Court reaffirms its decision upholding the "conspicuous display requirement" for entertainers but withdraws its decision upholding the requirement for managers.

II. *ENTERTAINERS*

In their arguments regarding entertainers, Plaintiffs contend that the conspicuous display requirement must be evaluated under strict First Amendment scrutiny because it mandates speech and alters the expressive conduct of entertainers at sexually oriented businesses. They argue that the requirement fails this test because the City has not shown a compelling interest in it and because it is not the least restrictive means available of achieving the City's purported interest.

In the alternative, Plaintiffs contend that, even if the requirement should be evaluated under the less stringent test of intermediate First Amendment scrutiny, it cannot survive under this test either because the City does not have an important governmental interest in compelling entertainers to wear their licenses. In addition, applying the intermediate scrutiny standard, Plaintiffs claim that the requirement is not narrowly tailored because it restrains substantially more speech than necessary.

Finally, Plaintiffs argue that the conspicuous display requirement violates the Equal Protection Clause because

it creates a discriminatory classification which turns upon the exercise of a fundamental constitutional right.

The Court will address each of these arguments in turn.

A. *Strict First Amendment Scrutiny*

In support of their new argument that the conspicuous display requirement should be evaluated under strict scrutiny on the basis that it mandates speech, Plaintiffs rely primarily *on Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988). In *Riley,* the Supreme Court, in pertinent part, struck down a state law that required professional fundraisers to make disclosures regarding the percentage of contributions they retained as consideration for their fundraising activities. The Court held that the statute should be subject to strict First Amendment scrutiny because it impermissibly compelled the fundraisers to engage in speech. Plaintiffs rely on the fact that the Court's opinion in *Riley* contains broad language suggesting that strict scrutiny should apply whenever a regulation mandates speech: "Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech. We therefore consider the act as a content based regulation of speech." *Id.* at 795, 108 S.Ct. 2667.

Plaintiffs argue that the conspicuous display requirement mandates speech in the same way that the invalid fundraising statute in *Riley* mandated speech. In particular, Plaintiffs contend that the conspicuous display requirement compels speech by requiring entertainers to divulge information about themselves to patrons by wearing their licenses while working.

The Court is not persuaded by Plaintiffs' reliance on *Riley*. Rather than create a new rule that all instances of mandated speech in any First Amendment context must be evaluated under strict scrutiny, the Supreme Court merely decided that *mandated* speech should be treated the same as *restrictions* on speech. *See id.* at 796-97, 108 S.Ct. 2667 ("There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what not to say."). Nothing in *Riley* indicates that if the mandated speech is not in a context that would otherwise be subjected to strict scrutiny, the mere fact that the challenged regulation mandates speech, rather than restricts it, would require the regulation to be subjected to strict scrutiny.

In *Riley,* the Court applied strict scrutiny because it found that the challenged statute was a content-based restriction on speech. In contrast, this Court has held, and now reaffirms, that the conspicuous display requirement is content-neutral with respect to entertainers because the legislative record reveals that the City Council relied upon evidence that such a requirement would help combat negative secondary effects associated with sexually oriented businesses. *See* Recon. Opinion, at 908-09. Therefore, the Court rejects the argument that strict scrutiny must be applied to this requirement.

Moreover, *Riley* concerned a type of speech that courts have consistently afforded greater protection than the speech that is at issue in this case. The speech in *Riley,*

solicitation of funds for charitable purposes, involved political speech.[1] In contrast, sexually oriented entertainment is protected, at best, only within the "outer perimeters of the First Amendment." *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991). Although the Supreme Court in *Riley* included broad language regarding the implication of the fact that the fundraising statute mandated speech, the Supreme Court was careful to note that the speech at issue was "fully protected expression." *Riley*, 487 U.S. at 796, 108 S.Ct. 2667. Thus, *Riley* does not require the conspicuous display requirement to be evaluated under a strict scrutiny analysis.

In any event, the Court also rejects Plaintiffs' analogy to *Riley* because it is not persuaded that the conspicuous display requirement compels any more than a minimal amount of speech. As indicated by the City and relied upon by the Court in its previous ruling, the Ordinance does not require that the licenses that entertainers must wear will contain their real names. Instead, these licenses only contain each license holder's stage name, photograph, and an identification number. *See* Recon. Opinion, at 908-09. The entertainers use their stage names and display their faces (which are depicted on the license photographs) while at work, even without the conspicuous display requirement. In addition, the identification number has no meaning to the public, since the City must keep the license application information completely confidential. *See* Sum.

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[1] More exactly, the Court found that the speech involved in *Riley* was commercial speech "intertwined with otherwise fully protected speech," including "advocacy and dissemination of information." *Riley*, 487 U.S. at 796, 798, 108 S.Ct. 2667.

Jmt. Opinion, at 841-43; 858-59. Thus, there is little or no expression compelled by the conspicuous display requirement that entertainers would not reveal without the requirement.

Plaintiffs also assert that the requirement that entertainers wear their licenses alters the entertainers' expressive conduct and therefore must be subjected to strict scrutiny. The Court rejects this argument as well. Even if the requirement imposes an incidental burden on the entertainers' expressive conduct, it is not subject to strict scrutiny unless it is content-based, an argument that the Court has rejected. *See Barnes,* 501 U.S. at 567-68, 111 S.Ct. 2456 (a content-neutral statute that "furthers substantial governmental interests" may be valid under less demanding scrutiny "despite its incidental limitations on some expressive activity"); *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 46-47, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986).

Plaintiffs creatively argue that, by requiring entertainers to wear licenses, the City is altering the entertainers' expression by:

> Mandat[ing] that dancers send out a subtle psychological message to customers stating that they are a bureaucratically regulated commodity, a concept quite discordant with the image of exoticism, freedom and sexuality which they are trying to convey. A major component of the entertainer's expressive conduct is her physical appearance while she is on stage. The presence of a badge, whether attached to her torso, ankle or wrist, would detract from her performance and mar the physical and, more significantly, the mental impression which the communication attempts to convey.

Plaintiffs' Motion to Amend, at 8. However, Plaintiffs have been able to cite no authority for the argument that a requirement such as a license display requirement alters the expression of topless dancers so as to require the application of strict scrutiny. The Court also notes that this argument is very similar to an argument raised by Plaintiffs that the Court rejected regarding the three foot and no touch rules. The Court held in its Summary Judgment Opinion that strict scrutiny was not applicable to these provisions. *See* Sum. Jmt. Opinion, at 855-56.

In short, Plaintiffs have failed to persuade the Court that strict scrutiny applies to the evaluation of the constitutionality of the conspicuous display requirement with respect to entertainers. Therefore, the Court need not address Plaintiffs' contention that the City has failed to show a compelling interest in enacting this regulation for entertainers.

B. *Intermediate First Amendment Scrutiny*

In the alternative, Plaintiffs argue that the conspicuous display requirement is also invalid under intermediate scrutiny. In support of this argument, Plaintiffs largely repeat arguments that the Court has already addressed and rejected.

As discussed in the Reconsideration Opinion, the Court finds that the City has met its burden of showing that it has an important governmental interest in requiring entertainers to wear their licenses. This interest is to allow police officers easier and less intrusive enforcement of the license requirement, a regulation that the Court has found to be valid.

Plaintiffs challenge this decision by citing *once again* a Tenth Circuit case, *American Constitutional Law Foundation v. Meyer,* 120 F.3d 1092 (10th Cir.1997), *cert. granted,* 522 U.S. 1107, 118 S.Ct. 1033, 140 L.Ed.2d 100 (1998), an opinion which struck down a requirement that individuals collecting signatures on political petitions wear licenses while collecting their signatures. The *Meyer* court quoted *Riley* for the proposition that "the First Amendment does not permit the state to sacrifice speech for efficiency." *Riley,* 487 U.S. at 795, 108 S.Ct. 2667; *Meyer,* 120 F.3d at 1102. This Court cited the *Meyer* opinion in its Summary Judgment Opinion, at 850 n. 201, but upon further consideration concluded that *Meyer* is not applicable here. Most importantly, *Meyer* involved political speech, and this Court is not persuaded that *Meyer's* reasoning should apply to the conspicuous display provision of Ordinance 97-75, which requires topless dancers to wear licenses that contain little information.

As for Plaintiffs' argument that the conspicuous display requirement must fail intermediate scrutiny because it is not narrowly tailored, the Court rejects this argument as well. The Court does not find that the requirement restrains substantially more speech than necessary. On the contrary, the Court is persuaded that the City Council reasonably concluded that, by requiring entertainers to display their licenses somewhere on their person while working, the City's police officers would interfere even less with the entertainers' expression than if there were no conspicuous display requirement. With this requirement, the police are able to ascertain from a distance whether an entertainer has a license to work in a sexually oriented business. Without the requirement, the

police would have to engage in more intrusive and potentially contentious confrontations with entertainers because they would have to ask the entertainers to retrieve their licenses upon demand, even when such a request would interrupt an entertainer's performance or other activities while working.

Plaintiffs have suggested law enforcement alternatives that they would prefer to the conspicuous display requirement to ensure that entertainers are all properly licensed while at work – indeed, alternatives that the Court finds logical. There is, however, no doctrinal requirement that the City enact the alternative that a Plaintiff or the Court prefers, or even the least restrictive means available to achieve the City's interest. *See* Sum. Jmt. Opinion, at 854-55 (citing *Ward v. Rock Against Racism,* 491 U.S. 781, 798, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989); *SDJ, Inc. v. City of Houston,* 837 F.2d 1268, 1276 (5th Cir.1988)). Since the Court has found that, for entertainers, the conspicuous display requirement is a content-neutral government regulation designed to address perceived secondary effects caused by adult businesses,[2] the City was required to enact regulations that are "narrowly tailored" to address these effects. The method used by the City to address the identified secondary effects must be left to the discretion of the elected City Council members, so long as their chosen method is narrowly tailored. The conspicuous display requirement

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[2] City Council members were concerned that the sexually oriented businesses were attracting minors or people who have been convicted of specified crimes, such as public lewdness or prostitution, to work as entertainers, thereby increasing the likelihood of such activities occurring at these businesses again.

for entertainers meets this criterion.[3] Despite Plaintiffs' arguments that the requirement intrudes on their artistic freedom, the Court concludes that the intrusion is only an incidental burden on the entertainers' expression, given the leeway the Ordinance includes as to where on an entertainer's person the license may be displayed. *See Barnes,* 501 U.S. at 567-68, 111 S.Ct. 2456.

The Court therefore concludes once again that, with respect to adult entertainers, the conspicuous display requirement is valid under intermediate First Amendment scrutiny.[4]

C. *Equal Protection*

Finally, Plaintiffs argue that the conspicuous display requirement violates the Equal Protection Clause. In no case to this Court's knowledge has a court struck down any regulations regarding sexually oriented entertainment based on the Equal Protection Clause. Plaintiffs once again rely on *Minneapolis Star & Tribune Company v. Minnesota Comm'r of Revenue,* 460 U.S. 575, 103 S.Ct. 1365, 75 L.Ed.2d 295 (1983). However, this case involved the First Amendment, not the Equal Protection Clause.

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[3] Again, this Court notes that the City has not required the entertainers to display their real names or addresses, but instead only their stage names, photographs, and identification numbers.

[4] In their arguments regarding intermediate scrutiny, Plaintiffs rely on cases involving commercial speech, including *Rubin v. Coors Brewing Co.,* 514 U.S. 476, 115 S.Ct. 1585, 131 L.Ed.2d 532 (1995), and *Edenfield v. Fane,* 507 U.S. 761, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993). However, Plaintiffs have failed to persuade the Court that it should apply the test relating to commercial speech, instead of the test articulated in the case law as specifically addressing the context of adult entertainment. *See* Sum. Jmt. Opinion, at 779-80.

Furthermore, *Minneapolis Star* concerned First Amendment guarantees with respect to freedom of the press. The Court will abide by its previous holding that the conspicuous display requirement is governed by cases specifically addressing sexually oriented entertainment.

The Court therefore is unpersuaded that Plaintiffs can succeed on their equal protection arguments.

III. *MANAGERS*

In its Reconsideration Opinion, the Court held that intermediate scrutiny applies to the conspicuous display requirement because the Houston City Council justified the requirement in the legislative record of Ordinance 97-75 with reference to negative secondary effects that the requirement was expected to alleviate. See Recon. Opinion, at 908-09. The Court did not notice at the time, however, that the legislative evidence upon which it relied in upholding this requirement pertained exclusively to entertainers. See Recon. Opinion, at 908-09.[5]

Plaintiffs now have argued – and a further detailed review of the legislative record with this issue specifically in mind convinces the Court – that there is absolutely nothing in the legislative record of Ordinance 97-75 that pertains to secondary effects that would be alleviated by imposing the conspicuous display requirement on managers working in adult businesses. The Court finds that the comments by witnesses and Council members that support

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[5] From the parties' initial briefing, the Court did not perceive that Plaintiffs' arguments on this topic were addressed to managers at all. *See* Sum. Jmt. Opinion, at 850. In the Reconsideration Opinion, the Court did not address managers separately from entertainers.

the City Council's justification for the conspicuous display requirement, even given a generous interpretation, simply *do not address the issue* of law enforcement difficulties with identifying managers at adult businesses. No one stated in any City Council meetings or hearings that police officers have had any difficulty identifying managers or perceiving managerial misconduct from a distance. Likewise, the record contains no evidence of any concern that police officers should be able to ascertain whether managers are licensed without having to confront them, ask to see their licenses, and thereby interfere with their expressive conduct.[6]

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[6] There is no evidence that managers even directly engage in expressive conduct as entertainers do. This point raises concern for the Court, which has not been addressed by the parties, as to whether managers are entitled to the same First Amendment protection as entertainers since their work does not entail "directly" engaging in the expressive conduct that entitles entertainers to that protection, namely topless dancing. The City does not appear to argue that managers are not entitled to First Amendment protection. Indeed, it appears that all parties *assume* that managers are entitled to such protection.

Without the benefit of argument on this issue, the Court concludes that managers are entitled to First Amendment protection. Because the work of managers furthers the primary purpose of sexually oriented businesses, which is to provide a forum for expression that is controversial and protected – to a limited extent – under the First Amendment, the Court concludes that managers are protected. This result is in harmony with *TK's Video, Inc. v. Denton County*, 24 F.3d 705, 709-10 (5th Cir.1994), which recognized that licensing of clerks and other employees of adult businesses, who do not themselves engage in sexually oriented performances, must still be evaluated under a First Amendment analysis. *See also TK's Video, Inc. v. Denton County*, 830 F.Supp. 335, 343-44 (E.D.Tex.1993) (invalidating licensing requirement for stockholders, limited partners, equity holders, property owners, and others associated with adult businesses on the ground that such a requirement violated these individuals' First Amendment rights) (this portion of opinion not appealed).

Therefore, with respect to managers, the Court withdraws its prior ruling upholding the conspicuous display requirement. Because the legislative justification for this requirement was only expressed with respect to entertainers, and the record contains no justification for this requirement for managers specifically, the Court must treat the requirement as a content-based regulation that is subject to strict scrutiny. Since the City has not demonstrated that the record contains evidence of any compelling interest in requiring managers to display their licenses while at work, the Court concludes that the requirement for managers is unconstitutional as a violation of the managers' First Amendment rights.

IV. *CONCLUSION*

For the foregoing reasons, it is

ORDERED that Plaintiffs' Motion to Amend [Doc. # 487] is **GRANTED IN PART and DENIED IN PART.** The Court holds that § 28-256(a) of Ordinance 97-75, the conspicuous display requirement, is constitutionally valid with respect to entertainers and invalid with respect to managers.

APPENDIX E

United States Court of Appeals,
Fifth Circuit.

N.W. ENTERPRISES INCORPORATED; Amethyst Enterprises Inc.; Campus Investments Incorporated; 1431 West 18th, Inc., Plaintiffs-Appellees,
FTU Inc.; DAJO Inc.; Ice Embassy Inc.; Texas Richmond Corporation; Andrea Stafford; Frank I. Kent; Naomi L. Parrish; Ann Marie Hasselbach;
Jeanne L.Grigsby; Susan Boyle; Dana Lynn Thomas; Kimberly Ann Dushman; Michelle Hadley; Colleen Cloer; Leah Marie Wilson; Carla K. Eaton; Cheryl Thompson; Robert G. Furey; HFR Enterprises, Inc.; Andrea Hill; Gina Oliver; Heather Weldin; Charisma Barry; Donna Soto; Andrea Allbright Marco;
AHD Houston Inc., a Texas Corporation d/b/a Centerfolds; DNW Houston, Inc.; Parabar Co.,
doing business as Paradise Club; Jane Doe One, Applicants; Jane Doe Two, Applicants; Dee & Dee Enterprises, Inc.; 9924 I-45 North, Inc.;
HI-Houston, Inc.; Charles Wesley, Inc.; Chil Soung, Inc., doing business as BJ's 24 Hour Newsstand; Daris, Inc., doing business as Riveria Cabaret; GNCD, Inc., doing business as Fantasy South; Rude Dog II, Inc., doing business as Scores Cabaret; Lone Starr Multi Theatres, Inc., doing business as Cinema West; AVW, Inc., doing business as Adult Video Megaplexxx; CLMS, Inc., doing business as 24 Hour Video & News; C-Snap, Inc., doing business as Interludes; East Bay, Inc.,
doing business as East Tex 24 Hour News & Video, doing business as Hempstead Adult Bookstore, none, doing business as XTC Cabaret Center; TNT Services, Inc., doing business as Xcalibur; 9834 Jensen, Inc., doing business as Harlem Knights; 8503 North Freeway, Inc., doing business as Fantasy Cabaret; Corporate Clubs of Texas, Inc., doing business as

Fantasia I XTC; U.S. Clubs, Inc., doing business as Fantasia III XTC; XTC Cabaret, Inc., doing business as XTC;
DHL Inc., doing business as Executive XTC; Cherie Feldman, doing business as Executive Playmates; Eve Enterprises, Inc., doing business as Club Royale; Long Tran, doing business as Ellington Newsstand; Nien X. Nguyen, doing business as DT Video; WMF Investments, Inc., doing business as Chesapeake Bay; AKM, Inc., doing business as Gigi's Cabaret; DHR, Inc., doing business as Hi-10 Cabaret; Panah, Inc., doing business as Mirage Cabaret; R & R Entertainment, Inc., doing business as Moments Cabaret; SSD Enterprises, Inc., doing business as Ritz Cabaret; HHE, Inc., doing business as Passion Cabaret; F & R Club, Inc., doing business as Silk Bar & Grill Cabaret; ATCOMM Services, Inc., doing business as Broadsteets; Houman Shaghagi, doing business as Foxxy's Cabaret; Southeast Texas Ventures, a Texas Joint Venture, doing business as The Trophy Club; KMRC, Inc., doing business as LaChatte; Aris Mylonas, doing business as Baby Dolls Saloon; MK Club & Restaurants, Inc., doing business as Moulin Rouge; 10128 TDC 1, Inc., doing business as Texas Dolls Cabaret; Southwest Clubco, Inc., doing business as Playmates; Duncan Burch, Inc., doing business as Michael's International; Obsession Cabaret, Inc., doing business as Obsession Cabaret; Norman R. Glenn, doing business as West Mt. Houston Newsstand, doing business as Far West News, doing business as Highway 6 Newsstand; James Drew, doing business as Gold Touch Stress Clinic and Velvet Touch Stress Clinic; Pete Caserly, doing business as Northwest News; A to X Video, doing business as Pacific Management Enterprises; Hughes & St. Clair, Inc., doing business as Pacific Management Enterprises; Quasar International, Inc., doing business as Pacific Management Enterprises; Video News, Inc., doing business as Pacific Management

Enterprises; Chuck Wesley, doing business as Pacific Management Enterprises; Chuck Wesley, Inc., doing business as Northwest News; Jacob Borenstein, doing business as Northwest News; 12851-59 Westheimer, Inc.; 608 West Mt. Houston, Inc.; Gino A. Barone, doing business as Ban Management Co., also known as Consolidated Video, doing business as Hillcroft News & Video, doing business as Telephone Road News & Video; Heaven Video & News; Airline Video and Thai Company; City Wide Group, Inc., doing business as Studz News; ANS, Inc., dba Lone Star News, doing business as Lone Star News, Northstar, Inc., dba North Freeway News; Northeast, Inc., dba Gulf Freeway News, doing business as Gulf Freeway News; Eastex 24-Hour Newsstand; G.W. Rogers; R. Glass; G. Humphrey; D.L. Stoneham; L.J. Putterman; M. Roberts; V.L. Auzston; J.J. Langen; H. Perez; A. Lucke; Y. Hinojosa; A.N. McMillen; B. Webb; R. Sternes; S. Mongonia; K. Martin; N. Roberts; V. Gobea; D. Quick; K. Warren; R. Sanchez; S. Jurek; N. Espinoza; C. Emery; K. Martin; C. Combs; J. Dampier; W. Kalinowski; J. Crenshaw; L.M. Bates; H. Mactavish; T. Dove; E. Castillo; K.K. Hannan; C.J. Sharpe; A.A. Cook; N. Bailey; T.R. King; L.B. Meagher; N. Henry; A. Bailey; D. Dodson; J. Suarez; A.N. McMillan; K. Rosenberry; C. Garcia; M. Fisher; D.M. Muenzler; T.J. Oakley; D. Carswell; A. Kelly; T. Western; K.A. Radar; L. Phillips; T. Jones; A. Gibson; G. Pierce; N. Neuenfeldt; T. Allen; S.L. Whittneburg; P.A. Buffin; C. Vaughn; T.L. Aldape; S.Y. Noreno; L. Tauarez; T. Dardas; N. Barry; T. Standride; J.D. Burden; S.S. Salazar; H.L. Lococo; S. Brady; S. Nnoli; E.I. Street; D. Jorgenson; D.G. Lewis; P.Z. German; J.M. Rogers, Jr.; B. Templemire; R. Duncan; J. Easterwood; J.C. Acres; W. Templemire, Jr.; Trumps, Inc., doing business as Rick's Cabaret, A Texas Corporation; Andrew Sefia, doing business as Rumors, and others similarly situated; D. Houston, Inc., doing business as Treasures, a Texas

Corporation, S.E. Management, Inc., doing business as Northshore Video and News, Jeana Wiley, Operator of Southeastern Management; Norman S. Harrison, Intervenor Plaintiffs-Appellees-Cross-Appellants, Elgin Investment Company, Ltd., doing business as French Quarter Theater; KQ Investments, doing business as Amenity Caberet; Mark Thai Do; doing business as Dong Kyong Modeling Studio; DSSS Aria Merica, Inc., doing business as Solid Platinum, a Texas Corporation; Marketing Organization of America, Inc., doing business as Exclusive Tanning, a Texas Corporation; Budget Distributors, Inc., doing business as Franc's of Beverly Hills, a Texas Corporation; Michael D's Restaurant, Inc., doing business as Houston Salon & Fitness Center, doing business as Texas Health Salon, a Texas Corporation; Le Crazyhorse Cabaret Astrodome, Inc., doing business as Malibu Resorts, doing business as Sensational Impressions, a Texas Corporation; EPZ Trading Company, doing business as Texas Health Salon, a Texas Corporation; Deux Soeur Enterprises, Inc., doing business as Native Tan, a Texas Corporation; Limerick, Inc., doing business as Video Specials, a Texas Corporation; You're A to X Video Outlet, Inc., a Texas Corporation, Intervenor Plaintiffs-Appellees,

v.

CITY OF HOUSTON, Defendant-Appellant-Cross-Appellee. N.W. Enterprises Incorporated; Amethyst Enterprises, Inc.; Campus Investments Incorporated; 1431 West 18th, Inc.; Plaintiffs-Appellees-Cross-Appellants, FTU Inc.; DAJO, Inc.; Ice Embassy, Inc.; Texas Richmond Corporation; Andrea Stafford; Frank I. Kent; AHD Houston, Inc., a Texas Corporation d/b/a Centerfolds; DNW Houston, Inc.; Parabar Co., doing business as Paradise Club; Jane Doe One, Applicants; Jane Doe Two, Applicants; Dee & Dee Enterprises, Inc.; 9924 I-45 North, Inc.; HI-Houston, Inc.; Charles Wesley,

Inc.; D. Houston, Inc., doing business as Treasures, a Texas Corporation; HFR Enterprises, Inc.; Andrea Allbright Marco; Naomi L. Parrish; Ann Marie Hasselbach; Jeanne L. Grigsby; Susan Boyle; Dana Lynn Thomas; Kimberly Ann Dushman; Michelle Hadley; Colleen Cloer; Leah Marie Wilson; Carla K. Eaton; Andrea Hill; Gina Oliver; Heather Weldin; Charisma Barry; Donna Soto; Cheryl Thompson; Robert Furey, Intervenor Plaintiffs-Appellees-Cross-Appellants,

and

Chil Soung, Inc., doing business as BJ's 24 Hour Newsstand; et al. (referred to as Chil Soung Appellants), Intervenor Plaintiffs-Appellees-Cross-Appellants, KQ Investments, doing business as Amenity Cabaret; Mark Thai Do, doing business as Dong Kyong Modeling Studio; Norman S. Harrison; DSSS Aria Merica, Inc., doing business as Solid Platinum, a Texas Corporation; Marketing Organization of America, Inc., doing business as Exclusive Tanning, a Texas Corporation; Budget Distributors, Inc., doing business as Franc's of Beverly Hills, a Texas Corporation; Michael D's Restaurant, Inc., doing business as Houston Salon & Fitness Center, doing business as Texas Health Salon, a Texas Corporation; Le Crazyhorse Cabaret Astrodome, Inc., doing business as Malibu Resorts, doing business as Sensational Impressions, a Texas Corporation; EPZ Trading Company, doing business as Texas Health Salon, a Texas Corporation; Deux Soeur Enterprises, Inc., doing business as Native Tan, a Texas Corporation; Limerick, Inc., doing business as Video Specials, a Texas Corporation; You're A To X Video Outlet, Inc., a Texas Corporation; Elgin Investment Company, Ltd., doing business as French Quarter Theater, Intervenor Plaintiffs-Appellees,

v.

City of Houston, Defendant-Appellant-Cross-Appellee.

Nos. 98-20255, 98-20885.

May 28, 2004.

Gerald E. Hopkins, Langtry, TX, for N.W. Enterprises Inc., Amethyst Enterprises, Inc., Campus Investments Inc. and 1431 West 18th, Inc.

David Allen Furlow, Thompson & Knight, Houston, TX, for FTU Inc., DAJO Inc., Ice Embassy Inc., Texas Richmond Corp., Andrea Stafford and Frank I. Kent.

John Haldane Weston, G. Randall Garrou, Weston, Garrou & DeWitt, Los Angeles, CA, Joe William Meyer, Meyer, Knight & Williams, Houston, TX, David Allen Furlow, Thompson & Knight, Houston, TX, for FTU Inc., DAJO Inc., Ice Embassy Inc., Texas Richmond Corp., Andrea Stafford, Frank I. Kent, Naomi L. Parrish, Ann Marie Hasselbach, Jeanne L. Grigsby, Susan Boyle, Dana Lynn Thomas, Kimberly Ann Dushman, Michelle Hadley, Colleen Cloer, Leah Marie Wilson, Carla K. Eaton, Cheryl Thompson, Robert G. Furey, HFR Enterprises Inc., Andrea Hill, Gina Oliver, Heather Weldin, Charisma Barry, Donna Soto and Andrea Allbright Marco.

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Becki M. Fahle, John J. Fahle, III, Carter & Fahle, San Antonio, TX, for Dee & Dee Enterprises Inc., 9924 I-45 North Inc., HI-Houston Inc. and Charles Wesley Inc.

Philip W. Boyko, Houston, TX, for Mark Thai Do and Norman S. Harrison.

L. Paul Decuir, Jr., Channelview, TX, for DSSS Aria Merica Inc.

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Gerald E. Hopkins, Langtry, TX, for Vista Video Corp. and Douglas Skyock.

Nelson T. Hensley, Houston, TX, for Chil Soung Inc., Daris Inc., GNCD Inc., Rude Dog II, Inc., Lone Starr Multi Theatres Inc., AVW Inc., CLMS Inc., C-Snap Inc., East Bay Inc., TNT Services Inc., 9834 Jensen Inc., 8503 North Freeway Inc., Corporate Clubs of Texas Inc., U.S. Clubs Inc., DHL Inc., Cherie Feldman, Eve Enterprises Inc., Long Tran, Nien X. Nguyen, WMF Investments Inc., AKM Inc., DHR Inc., Panah Inc., R & R Entertainment Inc., SSD Enterprises Inc., HHE Inc., F & R Club Inc., AT-COMM Services Inc., Houman Shaghagi, Southeast Texas Ventures, KMRC Inc., Aris Mylonas, MK Club & Restaurants Inc., 10128 TDC 1 Inc., Southwest Clubco Inc., Duncan Burch Inc., Obsession Cabaret Inc., Norman R. Glenn, James Drew, Pete Caserly, A to X Video, Hughes & St. Clair Inc., Quasar Intern. Inc., Video News Inc., Chuck Wesley, Chuck Wesley Inc., Jacob Borenstein, 12851-59 Westheimer Inc., 608 West Mt. Houston Inc., Gino A. Barone, Heaven Video & News, Airline Video and Thai Co., City Wide Group Inc., ANS Inc., Northstar Inc., Northeast Inc., Eastex 24-Hour Newsstand, G.W. Rodgers, R. Glass, G. Humphrey, D.L. Stoneham, L.J. Putterman, M. Roberts, V.L. Auzston, J.J. Langan, H. Perez, A. Lucke,

Y. Hinojosa, A.N. McMillen, B. Webb, R. Sternes, S. Mongonia, K. Martin, N. Roberts, V. Gobea, D. Quick, K. Warren, R. Sanchez, S. Jurek, N. Espinoza, C. Emery, K. Martin, C. Combs, J. Dampier, W. Kalinowski, J. Crenshaw, L.M. Bates, H. Mactavish, T. Dove, E. Castillo, K.K. Hannan, C.J. Sharpe, A.A. Cook, N. Bailey, T.R. King, L.B. Meagher, N. Henry, A. Bailey, D. Dodson, J. Suarez, A.N. McMillan, K. Rosenberry, C. Garcia, M. Fisher, D.M. Muenzler, T.J. Oakley, D. Carswell, A. Kelly, T. Western, K.A. Rader, L. Phillips, T. Jones, A. Gibson, G. Pierce, N. Neuenfeldt, T. Allen, S.L. Whittneburg, P.A. Buffin, C. Vaughn, T.L. Aldape, S.Y. Noreno, L. Tauarez, T. Dardas, N. Barry, T. Standride, J.D. Burden, S.S. Salazar, H.L. Lococo, S. Brady, S. Nnoli, E.I. Street, D. Jorgenson, D.G. Lewis, P.Z. German, J.M. Rogers, Jr., B. Templemire, R. Duncan, J. Easterwood, J.C. Acres, W. Templemire, Jr., Trumps Inc., Andrew Sefia and XTC Cabaret Inc.

Appeal from the United States District Court for the Southern District of Texas.

ORDER ON REHEARING

(Opinion Nov. 25, 2003, 5th Cir., 352 F.3d 162)

Before GARWOOD, JONES and STEWART, Circuit Judges.

PER CURIAM:

The court, having carefully considered the petitions for rehearing and rehearing en banc filed on behalf of sexually oriented businesses and entertainers in this case, GRANTS them IN PART and DENIES IN PART as follows:

1. We agree with the argument of FTU appellees that the district court lacked jurisdiction to enter an order of reconsideration in August 1998, partially reversing the injunctive relief that it granted on February 18, 1998, because this court had already obtained appellate jurisdiction over the same issues through the City's timely filed notice of appeal. The specifics of this jurisdictional reasoning need not be related here.

Because FTU is correct, it follows that the introductory paragraph of Section IV and a part of IV.C of the panel opinion, *see* 352 F.3d at 192, 196-97, must be vacated only to the extent that those discussions appear to "affirm" the district court decision, entered on reconsideration, which upheld the requirement that SOB entertainers wear and conspicuously display a city-issued identification card while performing. Instead, the proper disposition is that we REVERSE the court's earlier-issued injunction against enforcement of that requirement. *See N.W. Enterprises, Inc., et al. v. City of Houston,* 27 F.Supp.2d 754 at 848-50 (S.D.Tex.1998) (striking the provision). We REVERSE, and VACATE the injunction, because that provision of the Ordinance, viewed under a standard of intermediate scrutiny, is narrowly tailored to serve a substantial governmental interest in ensuring that all entertainers are properly licensed and that their licensure can be ascertained without interrupting the performances. More precisely, we concur that "an important goal of the new Ordinance was to allow police officers to enforce the law in adult businesses from a distance, without having to get themselves involved in illegal activity." *See* 27 F.Supp.2d at 908. We uphold this aspect of the Ordinance essentially for the reasons stated by the district court in its (ineffective)

reconsideration order. *See* 27 F.Supp.2d at 907-09 and 914-17.[1]

2. In all other respects, the Petitions for Rehearing are DENIED, and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc* (FED. R.APP. P. and 5TH CIR. R. 35), the Petitions for Rehearing En Banc are also DENIED.

[1] FTU additionally argues that before upholding this provision, we ought to permit further briefing, as this precise issue was not briefed on the merits on appeal. At this point, given the hundreds of pages of briefing already presented to this court, and the incredibly thorough briefing before and reasoning of the district court in the case, including on this precise issue, further substantive briefing would be a waste of time.

* Judge Smith did not participate in the consideration of the Petitions for Rehearing En Banc.

APPENDIX F

CITY OF HOUSTON ORDINANCE NO. 97-75

AN ORDINANCE AMENDING THE CODE OF ORDINANCES, HOUSTON, TEXAS, RELATING TO REGULATION OF SEXUALLY ORIENTED BUSINESSES AND EMPLOYEES OF SEXUALLY ORIENTED BUSINESSES; CONTAINING FINDINGS AND OTHER PROVISIONS RELATING TO THE FOREGOING SUBJECT; PROVIDING FOR SEVERABILITY; PROVIDING AN EFFECTIVE DATE; AND DECLARING AN EMERGENCY.

* * *

WHEREAS, numerous sexually oriented businesses exist within the City; and

WHEREAS, the City Council has adopted comprehensive regulations regarding the location of sexually oriented businesses and related matters, which are codified in Article III of Chapter 28 of the Code of Ordinances; and

WHEREAS, the City Council has also adopted comprehensive regulations regarding the interior configuration of adult arcades, which are codified in Article II of Chapter 28 of the Code of Ordinances; and

WHEREAS, Articles II and III of Chapter 28 of the Code of Ordinances have been adopted and amended after extensive studies by City Council and a City Council Committee on the Regulation of Sexually Oriented Businesses ("the Committee") whose work and findings are documented in the Committee reports filed with the City Council in connection with the consideration of Ordinance 83-1812, Ordinance 85-1337, Ordinance 86-323 and Ordinance 91-187 and/or in the preambles of the said

Ordinances, which reports and preambles are incorporated herein and readopted by reference; and

WHEREAS, in 1996 the Committee reconvened under the title "the City Council Committee on Sexually Oriented Businesses Ordinance Revision" to consider amendments and new ordinance provisions to enhance land use protection to residential areas, to extend protection to other land uses not previously addressed and to consider other issues relating to sexually oriented businesses and their employees; and

WHEREAS, the Committee has since conducted numerous public meetings and three public hearings and has received expert and lay testimony and evidence on numerous issues; and

WHEREAS, the Committee has compiled its findings in a report to the City Council that has been received in connection with the adoption of this Ordinance; and

WHEREAS, the City Council finds that sexually oriented businesses can exert dehumanizing influences on churches, schools, and day care centers, can have negative effects on property values, can contribute to increased criminal activities in the surrounding areas, and can exert the same types of negative community influences on other forms of land uses, such as parks that were not previously included in the classes of land uses protected under Article III of Chapter 28 of the Code of Ordinances; and

WHEREAS, the City Council finds that parks should be added to the land uses presently protected under Article III of Chapter 28 of the Code of Ordinances; and

WHEREAS, the City Council finds that multifamily land uses are deserving of protection under Article III of

Chapter 28 of the Code of Ordinances equivalent to that provided single family land uses; and

WHEREAS, the City Council finds that the distance of 750 feet previously required between sexually oriented businesses and protected land uses and the radius of 1,000 feet previously used to calculate the percentage of residential tracts in the vicinity of a sexually oriented business under Article III of Chapter 28 of the Code of Ordinances were based upon initial studies by the Department of Planning and Development and a concern on the part of the City Council that greater distances might unduly affect the ability of sexually oriented businesses to find conforming locations to operate within the City; and

WHEREAS, the City Council finds that comprehensive new land use studies by the Department of Planning and Development demonstrate that increasing such distances to 1,500 feet would not unduly impact the availability of conforming sites for sexually oriented businesses; and

WHEREAS, the City Council finds that increasing such distances to 1,500 feet would provide additional and needed protection to the community from the adverse effects of sexually oriented businesses without depriving such businesses of adequate opportunities to locate within the City; and

WHEREAS, the City Council finds that Article III of Chapter 28 of the Code of Ordinances should be amended to enhance provisions regarding signage, configuration, conduct of entertainment, age of admission and related matters to reduce the secondary effects of sexually oriented businesses upon the community and further protect the health, safety and welfare of the public; and

WHEREAS, the City Council finds that sexually oriented businesses provide enhanced opportunities for employee participation in various forms of criminal activities, including prostitution, lewd conduct, indecent exposure, obscenity law violations and related crimes that are associated with sexual conduct or sexually-oriented materials; and

WHEREAS, the City has a substantial public concern that its residents be protect ed from criminal activity and be protected from casual sexual activity that facilitates the spread of sexually transmitted diseases; and

WHEREAS, the City Council finds that persons who are employed in sexually oriented business should be subject to verification that they have not been convicted of certain crimes relating to the foregoing issues; and

WHEREAS, the City Council desires to adopt a new Article VIII of Chapter 28 of the Code of Ordinances that establishes permit requirements and rules of conduct for certain sexually oriented business employees to better protect the health, safety and welfare of the public; and

WHEREAS, the City Council finds that the provisions of Article II of Chapter 28 of the Code of Ordinances should be extended to adult mini-theatres in order to provide the same public health, safety and welfare protections to those establishments and the public that now exist for adult arcades; and

WHEREAS, the City Council finds that the experience gained in the operation of Articles II and III of Chapter 28 of the Code of Ordinances over the past several years had demonstrated certain administrative improvements

and clarifications that should be implemented; **NOW, THEREFORE,**

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF HOUSTON, TEXAS:

Section 1. That the findings contained in the preamble to this Ordinance are determined to be true and correct and are hereby adopted by the City Council and made a part of this Ordinance for all purposes. The findings, studies and reports developed in connection with the adoption of this Ordinance and previous amendments to Articles II and III of Chapter 28 of the Code of Ordinances, Houston, Texas, are also determined to be applicable to this Ordinance and are hereby incorporated and adopted or readopted for that purpose.

Section 2. That Article II of Chapter 28 of the Code of Ordinances, Houston, Texas, is hereby amended to read as follows:

* * *

Section 3. That Article III of Chapter 28 of the Code of Ordinances, Houston, Texas, is hereby amended to read as follows:

"ARTICLE III. SEXUALLY ORIENTED BUSINESSES

Sec. 28-121. Definitions.

As used in this article, the following words and terms shall have the meanings ascribed to them in this section, unless the context of their usage clearly indicates another meaning:

* * *

Adult cabaret. An establishment whose primary business is the offering to customers of live entertainment which is intended to provide sexual stimulation or sexual gratification to such customers, and which is distinguished by or characterized by an emphasis on matter depicting, describing or relating to specified sexual activities, or specified anatomical areas.

* * *

Adult lounge. An adult cabaret, as defined above, which is a permitted or licensed premises, pursuant to the Texas Alcoholic Beverage Code, where alcoholic beverages may be served or sold.

* * *

Applicant. The applicant for a permit shall be intended operator of the enterprise.

Church. A building, whether situated within the city or not, in which persons regularly assemble for religious worship intended primarily for purposes connected with such worship or for propagating a particular form of religious belief.

Commercial multi-unit center. A building or structure (including a shopping mall or strip shopping center) containing three (3) or more separate premises, each of which is offered by lease or otherwise for separate occupancy or control and each of which occupies an enclosed area having its own door or entranceway opening onto public property, a public way, or a common area.

* * *

Director. The chief of police and such employee(s) of the police department as he may designate to perform the duties of the director under this article.

* * *

Employee. Any person who renders any service whatsoever to the customers of an enterprise or who works in or about an enterprise and who receives compensation for such service or work from the operator or owner of the enterprise or from the customers therein.

Enterprise. An adult bookstore, adult cabaret, adult encounter parlor, adult lounge, adult modeling studio, adult movie theatre or any establishment whose primary business is the offering of a service or the selling, renting or exhibiting of devices or any other items intended to provide sexual stimulation or sexual gratification to its customers, and which is distinguished by or characterized by an emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas. The term 'enterprise' shall not be construed to include:

(1) Any business operated by or employing licensed psychologists, licensed physical therapists, licensed athletic trainers, licensed cosmetologists, or licensed barbers performing functions authorized under the licenses held;

(2) Any business operated by or employing licensed physicians or licensed chiropractors engaged in practicing the healing arts; or

(3) Any retail establishment whose major business is the offering of wearing apparel for sale to customers.

Entertainment. Any act or performance, such as a play, skit, reading, revue, pantomime, scene, song, dance, musical rendition or striptease, whether performed by employees, agents, contractors, or customers. The term 'entertainment' shall also mean bartenders, waiters, waitresses, or other employees exposing specified anatomical areas or engaging in specified sexual activities in the presence of customers.

* * *

Licensed day-care center. A facility licensed by the State of Texas, whether situated within the city or not, that provides care, training, education, custody, treatment or supervision for more than twelve (12) children under fourteen (14) years of age, where such children are not related by blood, marriage or adoption to the owner or operator of the facility, for less than twenty-four (24) hours a day, regardless of whether or not the facility is operated for a profit or charges for the services it offers.

Multifamily tract. Any residential tract that contains any building or buildings or portion or portions thereof, that is designed, built, rented, leased, sold, let out or hired out to be occupied, or which is occupied, in separate units, each containing living, sleeping and food preparation facilities, as the homes or residences of three or more families, groups, or individuals living independently of each other.

Operator. The manager or other natural person principally in charge of an enterprise.

Owner or *owners.* The proprietor if a sole proprietorship, all general partners if a partnership, or the corporation and all officers, directors, and persons holding fifty percent (50%) or more of the outstanding shares if a corporation.

Permit. A current, valid permit issued by the director pursuant to the terms of this article to an operator for an enterprise.

Public park. A publicly owned or leased tract of land, whether situated in the city or not, designated, dedicated, controlled, maintained and operated for use by the general public for active or passive recreational or leisure purposes by the city or any political subdivision of the state and containing improvements, pathways, access or facilities intended for public recreational use. The term 'public park' shall not include parkways, public roads, rights-of-way, esplanades, traffic circles, easements or traffic triangles unless such tracts or areas contain and provide improvements or access to a recreational or leisure use by the public. A current list of public parks shall be compiled and revised by the Director of the Parks and Recreation Department and maintained for public inspection in the office of the City Secretary.

Residential. Pertaining to the use of land, whether situated within the city or not, for premises such as homes, townhomes, patio homes, manufactured homes, duplexes, condominiums and apartment complexes, which contain habitable rooms for nontransient occupancy and which are designed primarily for living, sleeping, cooking, and eating therein. A premises which is designed primarily for living, sleeping, cooking and eating therein shall be deemed to be residential

in character unless it is actually occupied and used exclusively for other purposes. Hotels, motels, boarding houses, nursing homes, college or university dormitories, hospitals, and nursery schools shall not be considered to be residential. The term 'residential' shall also include any unimproved tract designated for tax appraisal purposes as residential by the Harris County Appraisal District if situated in the City or by the appraisal district of the county in which the tract is situated if not situated in the City. The term additionally shall include any tract, that, based upon the records of the planning official has been subdivided or platted for residential use, but that is not yet designated for tax appraisal purposes as residential.

School. A building, whether situated within the city or not, where persons regularly assemble for the purpose of instruction or education together with the playgrounds, stadia and other structures or grounds used in conjunction therewith. The term is limited to:

(1) Public and private schools used for primary or secondary education, in which any regular kindergarten or grades one through 12 classes are taught; and

(2) Special educational facilities in which students who have physical or learning disabilities receive specialized education in lieu of attending regular classes in kindergarten or any of grades one through 12.

* * *

Specified anatomical areas:

(1) Less than completely and opaquely covered:

a. Human genitals, pubic region or pubic hair, or

b. Buttock; or

c. Female breast or breasts or any portion thereof that is situated below a point immediately above the top of the areola; or

d. Any combination of the foregoing; or,

(2) Human male genitals in a discernibly erect state, even if completely and opaquely covered.

Specified sexual activities:

(1) Human genitals in a discernible state of sexual stimulation or arousal; or

(2) Acts of human masturbation, sexual intercourse of sodomy; or

(3) Fondling or other erotic touching of human genitals, pubic region or pubic hair, buttock or female breast or breasts; or

(4) Any combination of the foregoing.

Tract. A contiguous parcel of land under common ownership, whether situated within the city or not.

Sec. 28-122. Permit – Required.

(a) It shall be unlawful for any person to own, operate or conduct any business in an enterprise located within the city unless there is a permit for the enterprise.

* * *

Sec. 28-123. Same – Applications.

(a) Applications for a permit, whether original or renewal, must be made to the director by the intended operator of the enterprise. Applications must be submitted by hand delivery by the intended operator to the office of the captain of the vice division of the police department during regular working hours (8:00 a.m. to 4:00 p.m., Monday through Friday, city holidays excepted). Application forms shall be supplied by the director. The intended operator shall be required to give the following information on the application form:

(1) a. The name, street address (and mailing address if different) and Texas driver's license number of the intended operator;

b. The name and street address (and mailing address if different) of the owner(s);

(2) The name under which the enterprise is to be operated and a general description of the services to be provided;

(3) The telephone number of the enterprise;

(4) The address, and legal description of the tract of land on which the enterprise is to be located;

(5) If the enterprise is in operation, the date on which the owner(s) acquired the enterprise for which the permit is sought, and the date on which the enterprise began operations as an enterprise at the location for which the permit is sought; and

(6) If the enterprise is not in operation, the expected startup date (which shall be expressed in number of days from the date of issuance of the permit). If the expected startup date is to be more than ten days following the date of issuance of the permit, then a detailed explanation of the construction, repair or remodeling work or other cause of the expected delay and a statement of the owner's time schedule and plan for accomplishing the same.

(b) The application shall be accompanied by the following:

(1) Payment in full of a fee of:

a. ~~Three hundred fifty~~ Four hundred seventy-five dollars ($475.00) for an original application; or

b. ~~One hundred~~ Two hundred twenty-five dollars ($225.00) for a renewal application, as applicable, by certified check, cashier's check or money order, which fee shall not be refundable under any circumstances;

(2) A certified copy of the assumed name certificate filed in compliance with the Assumed Business or Professional Name Act (Texas Revised Civil Statutes Annotated, Business and Commerce Code, Chapter 36) if the enterprise is to be operated under an assumed name;

(3) If the enterprise is a Texas corporation, a certified copy of the articles of incorporation, together with all amendments thereto;

(4) If the enterprise is a foreign corporation, a certified copy of the certificate of authority to transact business in this state, together with all amendments thereto;

(5) If the enterprise is a limited partnership formed under the laws of Texas, a certified copy of the certificate of limited partnership, together with all amendments thereto, filed in the office of the Secretary of State under the Texas Revised Limited Partnership Act (Article 6132a-1 ~~Vernon's~~ Texas Revised Civil Statutes);

(6) If the enterprise is a foreign limited partnership, a certified copy of the certificate of limited partnership and the qualification documents, together with all amendments thereto, filed in the office of the Secretary of State under the Texas Revised Limited Partnership Act (Article 6132a-1 ~~Vernon's~~ Texas Revised Civil Statutes);

(7) Proof of the current fee ownership of the tract of land on which the enterprise is to be situated in the form of a copy of the recorded deed;

(8) If the persons identified as the fee owner(s) of the tract of land in item (7) are not also the owners of the enterprise, then the lease, purchase contract, purchase option contract, lease option contract or other document(s) evidencing the legally enforceable right of the owners or proposed owners of the enterprise to have or obtain the use and possession of the tract or portion thereof that is to be used for the enterprise for the purpose of the operation of the enterprise;

(9) Any of items (2) through (8), above shall not be required for a renewal application if the applicant states that the documents previously furnished the director with the original application or previous renewals thereof remain correct and current.

(c) The application shall contain a statement under oath that:

(1) The applicant has personal knowledge of the information contained in the application and that the information contained therein and furnished therewith is true and correct; and,

(2) The applicant has read the provisions of this article.

(d) A separate application and permit shall be required for each enterprise.

* * *

Sec. 28-124. Same – Term; renewal.

Each permit shall be valid for a period of one (1) year and shall expire on the anniversary of its date of issuance, unless sooner revoked, or surrendered. Each permit shall be subject to renewal as of its expiration date by the filing of a renewal application with the director. Renewal applications must be filed at least twenty (20) days prior to the expiration date of the permit that is to be renewed.

Sec. 28-125. Same – issuance or denial.

* * *

(b) The direct or shall issue a permit to the applicant unless one (1) or more of the following conditions exist:

(1) The applicant's enterprise is located within ~~seven hundred fifty (750)~~ one thousand five hundred (1,500) feet of any school, church, public park, or licensed day-care center. Measurements shall be made in a straight line, without regard to intervening structures or objects, from the nearest point on the property line of the applicant's enterprise to the nearest point on the property line of such school, church, public park, or licensed day-care center;

(2) The applicant's enterprise is located within one thousand (1,000) feet of any other enterprise for which there is a

permit. Measurements shall be made in a straight line, without regard to intervening structures, or objects, from the nearest point on the property line of the applicant's enterprise to the nearest point on the property line of any other enterprise;

(3) Seventy-five (75) percent or more of the tracts within a circular area, as described herein, are residential in character. The radius of such circular area shall be one thousand five hundred (~~1,000~~ 1,500) feet, and the center of such circular area shall correspond to the midpoint of a line joining the two most distant points on the boundary of the tract on which the enterprise is located; multifamily tracts shall be counted as multiple residential tracts based upon the tax records acreage of the multifamily tract according to the following formula: each one-eighth (1/8th) acre of land or fraction thereof shall be equivalent to one (1) residential tract. For purposes of this calculation a residential tract or multifamily tract shall be considered to be in the circular area in its entirety if any portion of it lies within the circular area;

* * *

(c) Property uses and distances for original applications shall be determined as of the time that the application is filed. If a renewal application is timely filed as provided in section 28-124 of

this Code, the property uses and measurements for the renewal application shall be determined as of the time that the original application for the enterprise was filed. If not timely filed, renewal applications shall be subject to the same fees and shall be treated in the same manner in all respects as original applications.

* * *

Sec. 28-133. Penalty.

(a) The violation of any provision of this article, including the doing of anything which is herein prohibited or declared to be unlawful or the failure to do anything or perform any duty which is required herein, shall be punishable as provided by Section 243.010(b) of the Local Government Code, as amended. Each day any violation shall continue shall constitute and be punishable as a separate offense.

* * *

Sec. 28-136 Access visibility, lighting supervision

* * *

(e) It shall be the duty of any owner, operator or manager of an enterprise to ensure that at least one on-site manager is on duty on the premises at all times during which the enterprise is open for business or during which customers are on the premises.

(f) It shall be the duty of any owner, operator or manager of an enterprise to ensure that all persons acting as managers or entertainers on the premises hold and display permits under article

VIII of this chapter, and that entertainers comply with section 28-258 of this Code.

* * *

Section 4. That Chapter 28 of the Code of Ordinances, Houston, Texas, is hereby amended by adding a new Article VIII, which reads as follows:

"ARTICLE VIII, SEXUALLY ORIENTED BUSINESS EMPLOYEES, CONDUCT AND OPERATIONS.

DIVISION 1. GENERALLY

Sec. 28-251. Definitions.

As used in this article, the following words and terms shall have the meanings ascribed to them in this section, unless the context of their usage clearly indicates another meaning:

Conduct any business in an enterprise. Any person who does any one (1) or more of the following shall be deemed to be conducting business in an enterprise:

(1) Operates a cash register, cash drawer or other depository on the premises of the enterprise where cash funds or records of credit card or other credit transactions generated in any manner by the operation of the enterprise or the activities of the premises of the enterprise;

(2) Displays or takes orders from any customer for any merchandise, goods, entertainment or other services offered on the premises of the enterprise;

(3) Delivers or provides to any customer any merchandise, goods, entertainment or

other services offered on the premises of the enterprise;

(4) Acts as a door attendant to regulate entry of customers or other persons into the premises of the enterprise; or

(5) Supervises or manages other persons in the performance of any of the foregoing activities on the premises of the enterprise.

Customer. Any person who:

(1) Is allowed to enter an enterprise or any portion of an enterprise in return for the payment of an admission fee, membership fee or any other form of consideration or gratuity;

(2) Enters an enterprise or any portion of an enterprise and purchases, rents or otherwise partakes of any merchandise, goods, entertainment or other services offered therein; or

(3) Is a member of and on the premises of an enterprise operating as a private or membership club or an enterprise that reserves any portion of the premises of the enterprise as a private or membership club.

Director. The chief of police and such employee(s) of the police department as he may designate to perform the duties of the director under this article.

Employee. Any person who renders any service whatsoever to the customers of an enterprise, works in or about an enterprise or who

conducts any business in an enterprise and who receives or has the expectation of receiving any compensation from the operator, or customers of the enterprise. By way of example, rather than limitation, the term includes the operator and other management personnel, clerks, dancers, models and other entertainers, food and beverage preparation and service personnel, door persons, bouncers, and cashiers. It is expressly intended that this definition cover not only conventional employer-employee relationships but also independent contractor relationships, agency relationships, and any other scheme or system whereby the 'employee' has an expectation of receiving compensation, tips, or other benefits from the enterprise or its customers in exchange for services performed.

Enterprise. An adult bookstore, adult cabaret, adult encounter parlor, adult lounge, adult modeling studio, adult movie theater or any establishment whose primary business is the offering of a service or the selling, renting or exhibiting of devices or any other items intended to provide sexual stimulation or sexual gratification to its customers, and which is distinguished by or characterized by an emphasis on matter depicting, describing or relating to specified sexual activities or specified anatomical areas. The term 'enterprise' shall include any premises for which a permit is required under either or both of articles II and III of this chapter. However, the term 'enterprise' shall not be construed to include:

(1) Any business operated by or employing licensed psychologists, licensed physical therapists, licensed athletic trainers, licensed cosmetologists, or licensed barbers

performing functions authorized under the licenses held;

(2) Any business operated by or employing licensed physicians or licensed chiropractors engaged in practicing the healing arts; or

(3) Any retail establishment whose major business is the offering of wearing apparel for sale to customers.

Entertainer. Any employee of an enterprise who performs or engages in entertainment.

Entertainment. Any act or performance, such as a play, skit, reading, revue, fashion show, modeling performance, pantomime, role playing, encounter session, scene, song, dance, musical rendition or striptease that involves the display or exposure of specified sexual activities or specified anatomical areas. The term 'entertainment' shall include any employee or entertainer exposing any specified anatomical areas or engaging in any specified sexual activities whatever in the presence of customers.

Manager. Any person who supervises, directs or manages any employee of an enterprise or any other person who conducts any business in an enterprise with respect to any activity conducted on the premises of the enterprise, including any 'on-site manager.'

On-site manager. A person charged by an owner or operator of an enterprise with the responsibility for direct supervision of the operation of the enterprise and with monitoring and observing all areas of the enterprise to which customers are admitted at all times during which

the enterprise is open for business or customers are on the premises of the enterprise.

Operator. The manger or other natural person principally in charge of an enterprise.

Owner or owners. The proprietor if a sole proprietorship, all general partners if a partnership, or the corporation if a corporation.

Permit. A current, valid permit issued by the director pursuant to the terms of this article.

Separate area. Any portion of the interior of an enterprise separated from any other portion of an enterprise by any wall, partition or other divider.

Specified anatomical areas:

(1) Less than completely and opaquely covered:

a. Human genitals, pubic region or pubic hair;

b. Buttock;

c. Female breasts or breasts or any portion thereof that is situated below a point immediately above the top of the areola; or

d. Any combination of the foregoing; or

(2) Human male genitals in a discernibly erect state, even if completely and opaquely covered.

Specified sexual activities:

(1) Human genitals in a discernible state of sexual stimulation or arousal;

(2) Acts of human masturbation, sexual intercourse or sodomy;

(3) Fondling or other erotic touching of human genitals, pubic region or pubic hair, buttock or female breast or breasts; or

(4) Any combination of the foregoing.

Sec. 28-252. Cumulative.

The provisions of this article are expressly made cumulative of other applicable laws including, without limitation, articles II and III of this chapter.

DIVISION 2. PERMITS

Sec. 28-253. Permit required.

(a) It shall be unlawful for any person who does not hold a permit to act as an entertainer or a manager of or in an enterprise.

(b) It shall be the duty of the operator and owners of each enterprise to ensure that no person acts as an entertainer or manager of or in the enterprise unless that person holds a permit.

Sec. 28-254. Issuance of Permits.

(a) Any person who desires to obtain an original or renewal permit shall make application to the director in person at the offices of the vice division of the police department between the hours of 8:00 a.m. and 12:00 p.m., Monday, Wednesday or Friday, city observed holidays excepted. The application shall be made under oath upon a form prescribed by the director and shall include:

(1) The name, home street address and mailing address (if different) of the applicant;

(2) Proof of the date of birth of the applicant and the identity of the applicant, including at least one photographic identity card issued by a governmental agency;

(3) A list of any criminal charges pending, convictions, and time of service in jail or prison as related to any applicable offense that is specified in section 1-10 of this Code; and

(4) Two passport-type photographs of the applicant of a size specified by the director, which shall become part of the photographic identity cards if a permit is issued.

(b) Each application shall be accompanied by a nonrefundable processing fee of $29.00. Each applicant shall be required to provide fingerprints to be used to verify the applicant's identity and criminal history information. Each applicant shall sign a waiver and authorization form authorizing the director to request on behalf of the applicant criminal history reports from the Texas Department of Public Safety and any appropriate federal agency.

(c) The director shall issue the permit within ten days from the date of filing of the application unless he finds that the applicant has been convicted of or spent time in jail or prison for an offense specified in the applicable provisions of section 1-10 of this Code within the time specified therein. If the application is not granted, then the applicant shall be mailed

notice of the grounds and of their right to provide evidence and request a hearing as provided by section 1-9(a) of this Code, within ten days from the date of filing of the application.

(d) Each permit issued by the director shall consist of two (2) photographic identification cards, a personal card and an on-site card.

(e) Any applicant whose application is denied and who requests a hearing on the denial shall be granted a hearing within ten days following the receipt of the request by the vice division of the police department. The hearing shall be conducted as provided in section 1-9(c) of the Code. If the hearing officer rules against the applicant, then the applicant shall be given notice of the right to seek an injunction or judicial review of the decision as provided in section 1-9 of the Code and applicable laws, including article 6252-13d of the Texas Revised Civil Statutes.

(f) In the event that the director fails to issue or deny a permit application within the time specified in subsection (c) or to provide a hearing within the time specified in subsection (e), then the applicant shall, upon written request, be immediately issued a temporary permit which shall be valid until the third day after the applicant is given notice of the decision of the director or the hearing officer.

(g) If any personal card or on-site card is lost or stolen, the holder thereof shall immediately notify the vice division and request a replacement, which shall be issued for a fee of ten dollars ($10.00) within three (3) days following verification of the identity of the holder.

(h) No permit application shall be accepted nor shall a permit be issued to any person who does not provide proof that he is at least 18 years old. Any permit issued by virtue of any misrepresentation or error to any person under age 18 shall be void.

Sec. 28-255. Term. transfer, amendment.

(a) A permit is valid for two years from the date of its issuance.

(b) A permit is personal to the named permit holder and is not valid for use by any other person.

(c) Each permit holder shall notify the vice division of the police department of his new address within ten days following any change of his address.

Sec. 28-256. Display.

(a) Each manager or entertainer shall conspicuously display his personal card upon his person at all times while acting as an entertainer or manager of or in an enterprise.

(b) Each manager or entertainer shall provide his on-site card to the manager or on-site manager in charge of the enterprise to hold while the manager or entertainer is on the premises.

(c) In any prosecution under section 28-253 of this Code, it shall be presumed that the actor did not have a permit unless the permit was in display as required under section (a) of this subsection.

Sec. 28-257. Revocation.

In the event that the director has reasonable grounds to believe that any permit holder has been convicted of or spent time in jail or prison for an offense as specified in the applicable provision of section 1-10 of this Code within the time specified therein, then the director may revoke the permit following a notice of the grounds and a hearing as provided in section 1-9(b) of this Code. In the event that the hearing officer determines that the permit should be revoked, then he shall issue his final decree to be effective in thirty days following the mailing of notice of the decree to the permit holder in order to allow the permit holder an opportunity before the permit must be surrendered to seek an injunction or judicial review of the decision as authorized in section 1-9 of this Code and applicable laws, including article 6252-13d of the Texas Revised Civil Statutes.

DIVISION 4. PENALTIES

Sec. 28-259. Penalties.

(a) The violation of any provision of this article, including the doing of anything which is herein prohibited or declared to be unlawful or the failure to do anything or perform any duty which is required herein, shall be punishable as provided by Section 243.010(b) of the Local Government Code. Each day that any violation shall continue shall constitute and be punishable as provided by Section 243.010(b) of the Local Government Code. Each day that any violation shall continue shall constitute and be punishable as a separate offense.

(b) The revocation or suspension of any permit shall not prohibit the imposition of a criminal penalty and the imposition of a criminal penalty shall not prevent the revocation or suspension of a permit."

Section 5. That Section 1-10 of the Code of Ordinances, Houston, Texas is hereby amended by adding a new item (3) to Subsection (b) thereof, which reads as follows:

"(3) Permits for sexually oriented business enterprise entertainers and managers issued pursuant to article VIII of chapter 28 of this Code:

a. Any of the following offenses as described in chapter 43 of the Texas Penal Code:

(i) Prostitution;

(ii) Promotion of prostitution;

(iii) Aggravated promotion of prostitution;

(iv) Compelling prostitution;

(v) Obscenity;

(vi) Sale, distribution or display of harmful material to a minor;

(vii) Sexual performance by a child;

(viii) Employment harmful to children; or

(ix) Possession or promotion of child pornography;

b. Any of the following offenses as described in chapter 21 of the Texas Penal Code:

(i) Public lewdness;

(ii) Indecent exposure; or

(iii) Indecency with a child;

c. Sexual assault or aggravated sexual assault as described in chapter 22 of the Texas Penal Code;

d. Harboring a runaway child as described in chapter 25 of the Texas Penal Code;

e. Criminal attempt, conspiracy or solicitation to commit any of the above offenses; or

f. Any violation of article VIII of chapter 28 of this Code.

The above-listed offenses shall be grounds for the denial, revocation or refusal for renewal of a permit under article VIII of chapter 28 of this Code because persons who hold that permit are employed by sexually oriented businesses where there is a high degree of opportunity for unlawful sexual conduct or the solicitation thereof, lewd conduct, obscenity offenses, and conduct harmful to minors. Therefore, the enumerated offenses are directly related to the duties and responsibilities authorized by the subject permit. There is a serious need to protect members of the public and fellow employees of sexually oriented business enterprises

from persons who have the foregoing criminal histories."

* * *

Section 8. (a) Except as provided in subsection (f) below, the amendments to Article III of Chapter 28 of the Code of Ordinances adopted in Section 3 of this Ordinance shall take effect on the 180th day next following the passage and approval of this Ordinance. All permits issued under Article III of Chapter 28 of the Code of Ordinances prior to the date of passage and approval of this Ordinance shall become void on the effective date. The purpose of this section is to provide for the orderly implementation of this Ordinance insofar as the amendments to Article III of Chapter 28 of the Code of Ordinances adopted in Section 3 of this Ordinance institute new requirements for enterprises permitted prior to the date of passage and approval of such amendments. With respect to enterprises that fail to conform to such requirements, this section is intended to provide an initial period for recoupment of investment, subject to extension as provided in subsection (c) below, and an opportunity to apply for a permit and, if the permit is denied, to initiate judicial review prior to the effective date of this Ordinance.

(b) Any enterprise that on the date of passage and approval of this Ordinance holds a current and valid permit issued under Article III of Chapter 28 of the Code of Ordinances prior to the date of passage and approval of this Ordinance, may operate until the effective date. However, in order to qualify for amortization or for the land use provisions of subsection (e), any such enterprise shall apply for a new permit under Article III of Chapter 28 of the Code of Ordinances as amended by Section 3 of this Ordinance on or before the 45th day next following

the date of passage and approval of this Ordinance. Any enterprise that is authorized to operate until the effective date under this subsection must remain at the same location at which it was situated on the date of passage and approval of this Ordinance. Enterprises that hold a permit on the date of passage and approval of this Ordinance and apply for a new permit within 45 days, as provided above, shall be afforded a prorated credit as determined by the director for permit fees previously paid.

(c) The provisions of this subsection (c) shall only be applicable to enterprises that on the date of passage and approval of this Ordinance hold a current and valid permit issued under Article III of Chapter 28 of the Code of Ordinances prior to the date of passage and approval of this Ordinance and that timely apply for a permit within 45 days following the date of passage and approval of this Ordinance under subsection (b), above, and the permit is denied by the director, although an appeal may be pending from the denial. The director shall grant an extension for the continued operation of the enterprise in the event that the owner proves that he will be unable to recoup his investment in the business that was incurred through the date of passage and approval of this Ordinance by the effective date.

In order to secure an extension of time, the owner must submit to the Director a written request for such extension on or before the ninetieth day next following the date of passage and approval of this Ordinance. No application for extension received by Director after that date shall be considered. Such written request shall set forth the following information:

(1) The amount of the owner's investment in the existing enterprise through the date of passage and approval of this Ordinance;

(2) The amount of such investment that has been or will be realized through the effective date;

(3) The life expectancy of the existing enterprise;

(4) The existence or nonexistence of lease obligations, as well as any contingency clauses therein permitting termination of such lease.

This information shall be supported by relevant documentary evidence such as financial statements and tax records. Copies of such documentary evidence must be attached to the request for extension. No investment that was not incurred by the date of passage and approval of this Ordinance shall be considered.

The Director shall notify an applicant for an extension of time of the time and place of a hearing to be held on such request before the Director or a hearing official that he may designate. After such hearing, the Director or hearing official shall issue a written order on the request for extension. If the owner desires to seek judicial review of the Director's or hearing official's order, he may do so by following the procedure set forth in Section 28-135 of the Code of Ordinances. Extensions that are granted shall specify a date certain for closure, and shall not be valid for operation at any other location.

(d) Existing enterprises that remain in operation pursuant to subsections (b) and (c) shall be not considered as having a permit for purposes of measurement of distances between enterprises as required pursuant to Section 28-125(b)(2) of the Code of Ordinances.

(e) For the purpose of limiting the impact of the amendments adopted in Article III of this Ordinance upon existing businesses, the provisions of Section 28-125(b)(2) of the Code of Ordinances that enterprises be situated 1,000 feet or more from each other shall not be applicable to any enterprise that holds a current and valid permit issued under Article III of Chapter 28 of the Code of Ordinances on the date of passage and approval of this Ordinance, provided that such enterprise makes application for a permit under subsection (b) of this section on or before the 45th day next following passage and approval of this Ordinance, and provided, further, that the application is not denied under any other land use criterion of Article III of Chapter 28 of the Code of Ordinances, Houston, Texas.

(f) The effective date of Section 3 of this Ordinance as provided in subsection (a), above shall only apply with respect to enterprises that on the date of passage and approval of this Ordinance hold a current and valid permit issued under Article III of Chapter 28 of the Code of Ordinances prior to the date of passage and approval of this Ordinance. Any enterprise that does not hold a current, valid permit, including any enterprise for which application is pending but not yet granted or denied on the date of passage and approval of this Ordinance shall be subject to Article III of Chapter 28 of the Code of Ordinances as amended by this Ordinance on such date of passage and approval, and Section 3 of this Ordinance shall be effective immediately upon its passage and approval with respect to any such enterprise. Any permit application currently pending or the denial of which is under appeal to a hearing official shall become invalid immediately upon the date of passage and approval of this

Ordinance and shall be returned along with a refund of the application fee to the applicant. Any permit application received after passage and approval of this Ordinance shall be considered by the Director under the criteria set forth in Article III of Chapter 28 of the Code of Ordinances as amended in this Ordinance, provided that any appeal to a hearing official may be heard by a hearing official appointed by the Director until hearing officials referenced under Section 28-125(d) of the Code of Ordinances as amended by this Ordinance are appointed by the mayor and confirmed by the city council. Any enterprise for which an otherwise current and valid permit has been suspended shall be treated as though it had a current and valid permit in the administration of this Section.

* * *

Section 10. The text of Sections 2 and 3 of this Ordinance has been prepared in legislative format for the convenience of the reader in determining additions to and deletions from Articles II and III of Chapter 28 of the Code of Ordinances. Those portions that have been stricken in the following manner (–) represent prior City Code text that has been deleted. They do not constitute a part of Articles II and III of Chapter 28 of the Code of Ordinances, as amended, and are provided only for the convenience of the reader in determining portions of the prior text that have been intentionally deleted. Similarly, the provisions that are underlined were so underlined to illustrate their addition to Articles II and III of Chapter 28 of the Code of Ordinances. While the underlined portions of the text constitute an actual portion of the City Code as amended, the underlining itself does not constitute a part of the City Code and was placed for the convenience of the reader.

Section 11. If any provision, section, subsection, sentence, clause, or phrase of this Ordinance, or the application of same to any person or set of circumstances is for any reason held to be unconstitutional, void or invalid, the validity of the remaining portions of this Ordinance or their application to other persons or sets of circumstances shall not be affected thereby, it being the intent of the City Council in adopting this Ordinance that no portion hereof or provision or regulation contained herein shall become inoperative or fail by reason of any unconstitutionality, voidness or invalidity of any other portion hereof, and all provisions of this Ordinance are declared to be severable for that purpose.

Section 12. There exists a public emergency requiring that this Ordinance be passed finally on the date of its introduction as requested in writing by the Mayor; therefore, this Ordinance shall be passed finally on such date and shall take effect as provided in Sections 7, 8 and 9, above.

PASSED AND APPROVED this 15th day of January, 1997.

/s/ Bob Lanier
Mayor of the City of Housto

Prepared by Legal Dept.
GDD/ps 1/6/97

/s/ Gilbert D. Douglas
Senior Assistant City Attorney

Requested by City Council Sexually Oriented Businesses Ordinance Revision Committee
L.D. File No. 41-94037-01

APPENDIX G

Mayor's Office

To the Honorable City Council of the City of Houston:

In accordance with the provisions of Article VII, Section 7 of the Charter of the City of Houston, I submit and introduce to you the ordinance set out below with the request that it be passed finally on the date of its introduction. There exists a public emergency requiring such action and I accordingly request that you pass the same if it meets with your approval.

/s/ Kathryn J. Whitmire

DATE: March 5, 1986 Mayor of the City of Houston

CITY OF HOUSTON ORDINANCE NO. 86-323

AN ORDINANCE AMENDING SECTION 28-35 OF THE CODE OF ORDINANCES OF THE CITY OF HOUSTON, TEXAS BY ENACTING A NEW ARTICLE III OF CHAPTER 28; PROVIDING FOR THE REGULATION OF THE LOCATION OF CERTAIN SEXUALLY ORIENTED BUSINESSES; PROVIDING FOR THE REGULATION OF THE EXTERIOR PORTION AND SIGNAGE OF SEXUALLY ORIENTED BUSINESSES, ADULT BOOKSTORES, AND ADULT MOVIE THEATRES; MAKING VARIOUS PROVISIONS AND FINDINGS RELATED TO THE SUBJECT; PROVIDING FOR SEVERABILITY; AND DECLARING AN EMERGENCY.

* * *

WHEREAS, Article 1175, Section 22, of the Revised Civil Statutes of the State of Texas authorizes home-rule cities to regulate the location and control the conduct of,

among other things, theatres, moving picture shows, vaudeville shows, and all places of public amusements; and

WHEREAS, Article 1175, Section 23, of the Revised Civil Statutes of the State of Texas authorizes home-rule cities to license any lawful business, occupation or calling that is susceptible to the control of the police power; and

WHEREAS, Article 1175, Section 24, of the Revised Civil Statutes of the State of Texas authorizes home-rule cities to license, regulate, control or prohibit the erection of signs or billboards as may be provided by charter or ordinance; and

WHEREAS, Article 1175, Section 34, of the Revised Civil Statutes of the State of Texas, among other things, authorizes home-rule cities to enforce all ordinances necessary to protect health, life and property, and to preserve and enforce the good government, order and security of such cities and their inhabitants; and

WHEREAS, Article 2372w of the Revised Civil Statutes of the State of Texas authorizes home-rule cities to adopt, by ordinance, regulations restricting the location of commercial enterprises whose major business is the offering of a service which is intended to provide sexual stimulation or sexual gratification to the customer; and

WHEREAS, the City Council Committee on the Regulation of Sexually Oriented Commercial Enterprises heard testimony from proponents and opponents of such enterprises at public hearings held on November 4, 1982, November 11, 1982, November 22, 1982, December 15, 1982, May 25, 1983, June 1, 1983, and June 2, 1983; October 25, 1983 and

WHEREAS, the Committee on the Regulation of Sexually Oriented Commercial Enterprises has compiled its findings in a report to Council; and

WHEREAS, City Council finds that churches and schools are centers of family oriented activities and therefore enhance the quality of life in surrounding areas; and

WHEREAS, City Council finds that sexually oriented commercial enterprises can exert a dehumanizing influence on persons attending churches or schools in the surrounding area; and

WHEREAS, City Council finds that a concentration of sexually oriented commercial enterprises can contribute to a decline in the value of surrounding properties; and

WHEREAS, City Council finds that a concentration of sexually oriented commercial enterprises can contribute to an increase in criminal activities in surrounding areas; and

WHEREAS, City Council finds that a sexually oriented commercial enterprise can contribute to the impairment of the character and quality of a surrounding residential neighborhood; and

WHEREAS, City Council finds that the signs and exterior portions of sexually oriented commercial enterprises, adult bookstores, adult movie theatres and massage establishments can be detrimental to the mental health of minors viewing such signs and exterior portions; and

WHEREAS, on the basis of the foregoing findings, which are set forth in the preamble thereof and adopted therein, the City Council adopted Ordinance No. 83-1812

(now codified, as amended, as Section 28-35 of the Code of Ordinances, Houston, Texas); and

WHEREAS, the 69th Texas Legislature, 1985 adopted Senate Bill 106, which amends Art. 2372w of the Revised Civil Statutes of Texas, so that premises holding alcoholic beverage permits and licenses may be included in the scope of land use regulations adopted thereunder for sexually oriented commercial enterprises; and

WHEREAS, the City Council Committee on the Regulation of Sexually Oriented Commercial Enterprises heard testimony regarding the amendment of Ordinance 83-1812 at a public hearing on December 17, 1985; and

WHEREAS, the Committee has compiled its findings in a supplemental report to Council; and

WHEREAS, the City Council finds that the findings previously adopted remain valid; and

WHEREAS, the City Council finds that the sexually oriented commercial enterprises having alcoholic beverage licenses and permits exert the same influences on churches and schools, have the same effect on property values, and contribute in the same manner to criminal activities as do those which do not serve alcohol, and that they should be included in the scope of the land use regulations for sexually oriented commercial enterprises; and

WHEREAS, the City Council finds that sexually oriented commercial enterprises exert the same influences on day care centers as on churches and schools, and that day care centers should be afforded the same degree of land use protection; and

WHEREAS, experience in the operation of Ordinance 83-1812 that has been gained over the past two years has demonstrated certain administrative improvements and clarifications that could be implemented; and

WHEREAS, the City Council desires to readopt the City's Sexually Oriented Commercial Enterprise regulations in order to (1) include establishments serving alcohol within the scope of land use controls (2) afford protection for day care centers and (3) effect certain administrative changes and clarifications in the operation thereof; NOW, THEREFORE,

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF HOUSTON, TEXAS:

Section 1. That the findings and recitations set out in the preamble to this Ordinance are found to be true and correct and they are hereby adopted by the City Council and made a part hereof for all purposes.

Section 2. That Section 28-35 of the Code of Ordinances, Houston, Texas, is hereby amended to constitute Article III of Chapter 28 of the Code of Ordinances, which reads as follows:

"ARTICLE III

SEXUALLY ORIENTED BUSINESSES

Section 28-121 *Definitions*. As used in this Article, the following words and terms shall have the meanings ascribed to them in this Section, unless the context of their usage clearly indicates another meaning:

* * *

Adult Cabaret

An establishment whose major business is the offering to customers of live entertainment which is intended to provide sexual stimulation or sexual gratification to such customers, and which is distinguished by or characterized by an emphasis on matter depicting, describing or relating to 'specified sexual activities,' or 'specified anatomical areas.'

* * *

Adult Lounge

An 'adult cabaret' as defined above which is a permitted or licensed premises pursuant to the Texas Alcoholic Beverage Code where alcoholic beverages may be served or sold.

* * *

Applicant

The applicant for a permit shall be the intended operator of the enterprise.

Church

A building, whether situated within the City or not, in which persons regularly assemble for religious worship intended primarily for purposes connected with such worship or for propagating a particular form of religious belief.

Commercial Multi-Unit Center

A building or structure (including a shopping mall or strip shopping center) containing three (3) or more separate premises, each of which is offered by lease or otherwise for separate occupancy or control and each of which

occupies an enclosed area having its own door or entranceway opening onto public property, a public way, or a common area.

Conduct Any Business In An Enterprise

Any person who does any one or more of the following shall be deemed to be conducting business in an enterprise:

1. operates a cash register, cash drawer or other depository on the enterprise premises where cash funds or records of credit card or other credit transactions generated in any manner by the operation of the establishment or the activities conducted therein are kept;

2. displays or takes orders from any customer for any merchandise, goods, entertainment or other services offered on the enterprise premises;

3. delivers or provides to any customer any merchandise, goods, entertainment or other services offered on the enterprise premises;

4. acts as a door attendant to regulate entry of customers or other persons into the enterprise premises; or

5. supervises or manages other persons in the performance of any of the foregoing activities on the enterprise premises.

Customer

Any person who:

(1) is allowed to enter a 'regulated establishment' in return for the payment of

an admission fee or any other form of consideration or gratuity; or

(2) enters a 'regulated establishment' and purchases, rents or otherwise partakes of any merchandise, goods, entertainment or other services offered therein; or

(3) is a member of and on the premises of a 'regulated establishment' operating as a private club.

Director

The Chief of Police and such employee(s) of the Police Department as he may designate to perform the duties of the 'Director' under this Article.

* * *

Employee

Any person who renders any service whatsoever to the customers of a 'regulated establishment' or who works in or about a 'regulated establishment' and who receives compensation for such service or work from the operator or owner of the 'regulated establishment' or from the customers therein.

Enterprise

An adult cabaret, adult encounter parlor, adult lounge, adult modeling studio, or any establishment whose major business is the offering to customers of a product or service which is intended to provide sexual stimulation or sexual gratification to such customers, and which is distinguished by or characterized by an emphasis on matter depicting, describing or relating to 'specified sexual activities' or 'specified anatomical areas. The term 'enterprise' shall

not be construed to include (1) any 'adult bookstore,' or 'adult movie theatre,' as those terms are defined herein, (2) any business operated by or employing licensed psychologists, licensed physical therapists, licensed athletic trainers, licensed cosmetologists, or licensed barbers performing functions authorized under the licenses held, (3) any business operated by or employing licensed physicians or licensed chiropractors engaged in practicing the healing arts, or (4) any retail establishment whose major business is the offering of wearing apparel for sale to customers.

Entertainment

Any act or performance, such as a play, skit, reading, revue, pantomime, scene, song, dance, musical rendition or striptease, whether performed by employees, agents, contractors, or customers. The term 'entertainment' shall also mean bartenders, waiters, waitresses, or other employees exposing 'specified anatomical areas' or engaging in 'specified sexual activities' in the presence of customers.

Exterior Portion

Any part of the physical structure of a 'regulated establishment,' including a wall, veneer, door, fence, roof, roof covering, or window, which is visible from any public way or public property.

Licensed Day-Care Center

A facility licensed by the State of Texas, whether situated within the City or not, that provides care, training, education, custody, treatment or supervision for more than twelve (12) children under fourteen (14) years of age, where such children are not related by blood, marriage or adoption to the owner or operator of the facility, for less

than twenty-four (24) hours a day, regardless of whether or not the facility is operated for a profit or charges for the services it offers.

Operator

The manager or other natural person principally in charge of a 'regulated establishment.'

Owner or Owners shall mean the proprietor if a sole proprietorship, all partners (general and limited) if a partnership, or all officers, directors, and persons holding ten percent (10%) or more of the outstanding shares if a corporation. The term 'owner' shall not include any such person who has given to the operator a statement under oath that he does not desire to be listed on the permit application and that he waives any right to any notice that is required or permitted to be given under this Article.

Permit

A current, valid permit issued by the Director pursuant to the terms of this Article to an operator for an 'enterprise.'

Regulated Establishment

Any 'enterprise,' 'adult bookstore,' or 'adult movie theatre' as defined herein.

Residential

Pertaining to the use of land, whether situated within the City or not, for premises such as homes, townhomes, patio homes, mobile homes, duplexes, condominiums and apartment complexes, which contain habitable rooms for non-transient occupancy and which are designed primarily for living, sleeping, cooking, and eating therein. A premises which is designed primarily for living, sleeping,

cooking and eating therein shall be deemed to be residential in character unless it is actually occupied and used exclusively for other purposes. Hotels, motels, boarding houses, nursing homes, hospitals, and nursery schools shall not be considered to be residential.

School

A building, whether situated within the City or not, where persons regularly assemble for the purpose of instruction or education together with the playgrounds, stadia and other structures or grounds used in conjunction therewith. The term is limited to (1) public and private schools used for primary or secondary education, in which any regular kindergarten or grades one through twelve classes are taught, and (2) special educational facilities in which students who have physical or learning disabilities receive specialized education in lieu of attending regular classes in kindergarten or any of grades one through twelve.

* * *

Specified Anatomical Areas

(1) Less than completely and opaquely covered:

(i) Human genitals, pubic region or pubic hair, or

(ii) Buttock, or

(iii) Female breast or breasts below a point immediately above the top of the areola, or

(iv) Any combination of the foregoing; or,

(2) Human male genitals in a discernibly erect state, even if completely and opaquely covered.

Specified Sexual Activities

(1) Human genitals in a discernible state of sexual stimulation or arousal, or

(2) Acts of human masturbation, sexual intercourse or sodomy, or

(3) Fondling or other erotic touching of human genitals, pubic region or pubic hair, buttocks or female breast or breasts, or

(4) Any combination of the foregoing.

Tract

A contiguous parcel of land under common ownership, whether situated within the City or not.

Section 28-122 *Permit Required.*

(a) It shall be unlawful for any person to own, operate or conduct any business in an enterprise located within the City unless there is a permit for the enterprise.

* * *

Section 28-124 *Term of Permit; Renewal.*

Each permit shall be valid for a period of one year and shall expire on the anniversary of its date of issuance, unless sooner revoked, or surrendered. Each permit shall be subject to renewal as of its expiration date by the filing of a renewal application with the Director. Renewal applications must be filed at least twenty (20) days prior to the expiration date of the permit that is to be renewed.

Section 28-125 *Issuance or Denial of Permit.*

* * *

(b) The Director shall issue a permit to the applicant unless one or more of the following conditions exist:

(1) The applicant's enterprise is located within 750 feet of any school, church, or licensed day care center. Measurements shall be made in a straight line, without regard to intervening structures or objects, from the nearest point on the property line of the applicant's enterprise to the nearest point on the property line of such school, church, or licensed day care center;

(2) The applicant's enterprise is located within 1000 feet of any other enterprise for which there is a permit. Measurements shall be made in a straight line, without regard to intervening structures or objects, from the nearest point on the property line of the applicant's enterprise to the nearest point on the property line of any other enterprise;

(3) Seventy-five percent (75%) or more of the tracts within a circular area, as described herein, are residential in character. The radius of such circular area shall be 1000 feet, and the center of such circular area shall correspond to the midpoint of a line joining the two most distant points on the boundary of the tract on which the enterprise is located;

(4) The applicant failed to supply all of the information requested on the application;

(5) The applicant gave materially false, fraudulent or untruthful information on the application;

(6) The applicant's enterprise is not in compliance with Section 28-129 and Section 28-130 of this Article;

(7) The application or the enterprise does not meet any other requirement of this Article;

(8) The applicant has not fully complied with all State, Federal and local laws or regulations affecting the conduct of its business; or

(9) The operator has had a permit revoked for the same enterprise within the one hundred eighty (180) day period next preceding the date that the application was filed.

(c) Property uses and distances for original applications shall be determined as of the time that the application is filed. If a renewal application is timely filed as provided in Section 28-124, the property uses and measurements for the renewal application shall be determined as of the time that the original application for the enterprise was filed. If not timely filed, renewal applications shall be subject to the same fees and shall be treated in the same manner in all respects as original applications.

* * *

Section 28-128 *Other Permit Provisions.*

(a) A permit is valid only at the location for which it is issued.

* * *

Section 28-133 *Violation Deemed Misdemeanor; Continuing Violations.*

Violation of any provision of this article that is not otherwise punishable pursuant to Article 2372w, Texas

Revised Civil Statutes, as amended, shall be punishable by a fine of not less than one hundred fifty dollars ($150) nor more than two hundred dollars ($200). Each day any violation continues shall constitute and be punishable as a separate offense.

* * *

Section 4.

(a) This Ordinance shall take effect on June 3, 1986; provided that the Director shall forthwith proceed to accept applications and issue permits pursuant to the terms of Section 2, above, in accordance with the procedures established in this Section 4. Such permits, if granted, shall be dated June 3, 1986.

(b) Any operator of an enterprise who desires to continue its operation on or after June 3, 1986, or any person who desires to establish an enterprise that will be in operation on June 3, 1986, shall file a permit application with the Director on or before Apri1 4, 1986. If the enterprise is in existence and operation, then the applicant shall furnish evidence with the application in the form of business records and other relevant documents which will set forth and establish the length of time that the enterprise has been in continuous business operation as an enterprise at the location applied for, whether under its present name and ownership or a previous name and ownership, without a closure of thirty consecutive days or more, extending through the date of the permit application ("term of operation").

* * *

Section 5.

(a) The provisions of this Section shall only apply to:

(1) any adult lounge that is in business as an adult lounge on March 5, 1986, and is operating at the same location where it was situated on that date, and

(2) any enterprise of any other type for which a current valid permit is in effect as issued under Section 28-35 (formerly Section 28-73) of the Code of Ordinances on March 5, 1986, and which is operating at the same location where it was situated on that date;

Provided that an application is filed for a permit to continue the operation of the business pursuant to Section 4, above on or before April 4, 1986. The term "existing enterprise" as used in this Section shall be so limited in its construction.

(b) an existing enterprise may remain in business, even if the permit application is denied, until November 30, 1986.

* * *

Section 8. There exists a public emergency requiring that this Ordinance be passed finally on the date of its introduction; therefore, this Ordinance shall be passed finally on such date and shall take effect as provided in Section 4 above.

PASSED this 5th day of March, A.D. 1986.

APPROVED this 5th day of March, A.D. 1986.

/s/ Kathryn J. Whitmire
Mayor of the
City of Houston

Prepared by Legal Dept. /s/ _____
(RJC/PB:po 03/04/86) Senior Assistant City Attorney
(L. D. File No. 69,941-R2)
(Requested by City Council Committee on the Regulation of Sexually Oriented Commercial Enterprises.)

I, ANNA RUSSELL, City Secretary of the City of Houston, Texas, do hereby certify that the within an [sic] foregoing is a true and correct copy of Ordinance No. 86-323, passed and approved, by the City Council on the 5th day of March, 1986 as the same appears in the records in my office.

WITHNESS [sic] my hand and the Seal of said City this 30th day of May, 1997.

/s/ Anna Russell
Anna Russell
City Secretary of the
City of Houston

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

N.W. ENTERPRISES, INC., et al.,	§	
	§	
Plaintiffs,	§	CIVIL ACTION NO. H-97-0196
	§	
v.	§	
	§	
THE CITY OF HOUSTON,	§	
	§	
Defendant.	§	

ORDER OF SEVERANCE

(Filed Aug. 28, 1998)

The Court hereby severs for later consideration the issue of availability of alternative sites under the City of Houston's Ordinance No. 97-75's amendments regarding multifamily dwellings and public parks. The portion of this case in which these issues remain is hereby **administratively closed**. Final judgment will be entered on all other issues.

SIGNED at Houston, Texas this 28th day of August, 1998.

/s/ Nancy F. Atlas
NANCY F. ATLAS
UNITED STATES
DISTRICT JUDGE

APPENDIX I

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

N.W. ENTERPRISES, INC., et al.,	§	
Plaintiffs,	§	CIVIL ACTION NO. H-97-0196
v.	§	
THE CITY OF HOUSTON,	§	
Defendant.	§	

FINAL JUDGMENT

(Filed Aug. 31, 1998)

The Court finds, under Fed. R. Civ. P. 54(b), that there is no just reason for delaying entry of judgment on all issues other than the multifamily dwellings and parks issue identified above. Therefore, the Court now enters final judgment on all issues decided in its Amended Memorandum Opinion and Order entered June 9, 1998 [Doc. # 472] (amending the Memorandum Opinion and Order entered February 18, 1998 [Doc. # 331]), the Supplemental Memorandum Opinion and Order entered June 11, 1998 [Doc. # 474], and the Amended Memorandum Opinion and Order Regarding Conspicuous Display Requirement entered August 10, 1998 [Doc. # 511] (amending the Memorandum Opinion and Order Regarding Conspicuous Display Requirement entered August 3, 1998 [Doc. # 509]).

SIGNED at Houston, Texas this 31st day of August, 1998.

/s/ Nancy F. Atlas
NANCY F. ATLAS
UNITED STATES
DISTRICT JUDGE